111-1-66

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1015.

THE COUNTY OF OTOE, PLAINTIFF IN ERROR,

vs.

JOHN T. BALDWIN.

FILED OCTOBER 3, 1883.

No. 1235.

JOHN T. BALDWIN, PLAINTIFF IN ERROR.

vs.

THE COUNTY OF OTOE.

FILED DECEMBER 26, 1883.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

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INDEX.

	Original.	Print.
Caption	1	
Petition (No. 235)	2	
Copy of bond	236	
Answer	238	
Reply	287	
Order consolidating cases	288	

Petition (No. 319)	290	9
Exhibit A—copy of bond	325	11
Answer	327	12
Reply	333	16
Certificate of division	335	17
"A."—Act to authorize Otoe county to subscribe, &c., January 6, 1860	336	18
"B."—Act to define powers and duties of county commissioners and county clerks, January 11, 1861	338	19
"C."—Act to enable counties, &c., to borrow money, &c., February 16, 1869	343	26
Judgment	345	28
Bill of exceptions	346	29
plaintiff's evidence	346	29
defendant's "	346	29
testimony of Lewis Dunn	346	29
John T. Baldwin	347	30
Clerk's certificate	353	34
Writ of error sued out by defendant	354	35
Citation	355	35
Bond	356	36
Assignment of errors by defendant	358	37
Writ of error sued out by plaintiff	362	38
Bond	363	39
Stipulation of counsel as to submission of cases, and printing record	364	39

1 Pleas before the Honorable George W. McCrary, judge of the circuit court of the United States for the district of Nebraska, and Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in the circuit court of the United States for the eighth judicial circuit and district of Nebraska, at the term of May, 1883.

JOHN T. BALDWIN, Plaintiff in Error,
vs.
THE COUNTY OF OTOE, Defendant in Error.

Be it remembered that on the 1st day of April, A. D. 1882, there was filed in the office of the clerk of the United States circuit court for the district of Nebraska a petition, which said petition is in words and figures following, that is to say:

2 In the Circuit Court of the United States, District of Nebraska.

JOHN T. BALDWIN
vs.
THE COUNTY OF OTOE. } Petition.

John T. Baldwin, plaintiff, complains of the County of Otoe, defendant, and says that he is a resident in and citizen of the State of Iowa, and the defendant is, and for twenty years and more last past has been, a municipal corporation, created and organized by and under the laws of the late Territory of Nebraska, and since its admission into the Union as a State has been recognized by the laws thereof, and is a citizen of said State.

On the 12th day of November, 1866, the said defendant made, among others, its forty-eight several bonds, dated on that day, by each whereof it acknowledged itself indebted unto the Council Bluffs and St. Joseph Railroad Company in the sum of five hundred dollars, which sum it thereby promised to pay to said company or its assigns, at the office of Duncan, Sherman & Company, in the city of New York, on the 1st day of January, 1887, with interest thereon, from the 1st day of January next, after the said date thereof, at the rate of ten per cent. per annum. payable semi-annually, at the same place, on the first days of January and July of each year, on the presentation and surrender as they fall due of coupons or interest warrants thereto severally attached, the first payment of interest to be made on the first day of July next ensuing the date thereof. And it was therein recited in each of said bonds that it was one of a series of one hundred and sixty of the like tenor and date, one hundred of which were for one hundred dollars, and sixty were for five hundred dollars, in the aggregate amounting to $40,000, executed and issued or to be issued from time to time as the wants of said county shall require to pay to said company as an appropriation made by said county to it to aid in the construction of its railroad, to be located in Fremont county, Iowa, through a point most convenient to Nebraska City, in said

county, and that said debt was authorized by a vote of the legal voters of said county, taken at an election duly held under and by virtue of an order of the county commissioners of said county on the 17th day of March, 1866, in pursuance of the several acts of the Legislature of the Territory of Nebraska in such cases made and provided, and a resolution of the board of county commissioners of said county granting such aid, which bond was duly issued and delivered to said company, and by it assigned in blank; for value, the same was sold and delivered by said company, and has in due course of business come to said plaintiff, who has become and is the true and lawful owner and holder thereof, together with the coupons thereto annexed, and without any knowledge of any facts, if any there be, affecting its validity. By an act of the Legislature of said Territory, entitled "An act to authorize the county commissioners of Otoe county to issue the bonds of said county to the amount of one hundred and fifty thousand dollars to the Burlington and Missouri railroad, or any other railroad running east from Nebraska City," approved February 15th, 1869, the said Territory recognized the due issue of said bonds. The bonds, which have so, as aforesaid, come to the hands of said plaintiff, are numbered as follows:

1 to 13, inclusive; 20 to 34, inclusive; and 39 to 58, inclusive; and a copy of one thereof, save its number, is hereto annexed, with the endorsement thereon. Said county paid all of the coupons attached to said bonds when the same were issued, except those which matured on and after January 1st, 1870.

3 First cause of action. When said plaintiff so aforesaid became the holder of said bonds, to wit, No. 9, a coupon was attached thereto, which was in the words and figures following, to wit:

OTOE COUNTY RAILROAD BOND.

The county of Otoe, in Nebraska Territory, will pay the bearer thereof, on the first day of January, 1870, twenty-five dollars, at the office of Duncan, Sherman & Co., in the city of New York, for interest due that day on its railroad bond No. 9.

$25.00. MILLS S. REEVES,
Treasurer.

whereof, as well as the interest on said bond represented thereby, said plaintiff became then and there the owner and holder. When the same became due the said defendant had not, nor ever had, at the place of payment therein named, any funds to pay the same or any part thereof, and has never paid any part of said coupon or interest, but remains and is indebted to said plaintiff thereon in the full sum of $25.00 and interest thereon, from the day of payment therein mentioned, at 10 per cent. per annum.

Note by clerk Sup. Court U. S.: Here follows 927 causes of action in the same terms, except as to the numbers of the bonds and time

of maturity of coupons counted on, omitted in printing the record per stipulation of counsel. See page ——.

235 he said plaintiff purchased the bonds and coupons above mentioned from Mrs. Harriet Phelps, who held them in her own right, from a time not more than six months after their date until she sold and transferred them to plaintiff, and during all that time she was a married woman.

Wherefore the said plaintiff prays judgment against said defendant for $23,200, and interest as follows:

On $125, from January 1, 1870; on $75, from July 1, 1870; on $1,200, from January 1, 1871; on $1,200, from July 1, 1871; on $1,175, from January 1, 1872; on $1,200, from July 1, 1872; on $1,200, from January 1, 1873; on $425, from July, 1873; on $400, from January 1, 1874; on $375, from July 1, 1874; on $400, from January 1, 1875; on $400, from July 1, 1875; on $400, from January 1, 1876; on $1,200, from July 1, 1876; on $1,200, from January 1, 1877; on $1,200, from July 1, 1877; on $1,200, from January 1, 1878; on $1,200, from July 1, 1878; on $1,200, from January 1, 1879; on $1,200, from July 1, 1879; on $1,200, from January 1, 1880; on $1,200, from July 1, 1880; on $1,200, from January 1, 1881; on $1,200, from July 1, 1881; on $1,200, from January 1, 1882; and the costs of this action.

J. M. WOOLWORTH,
Pl'ff's Att'y.

DISTRICT OF NEBRASKA, *ss:*

J. M. Woolworth, being duly sworn, says he is attorney for pl'ff in the above petition, and the facts stated therein are true as he verily believes, and said plaintiff is a non-resident of said district.

J. M. WOOLWORTH.

Subscribed in my presence, and sworn to before me, this 1st day of April, 1882.

J. P. ENGLISH, [SEAL.]
Notary Public.

236 UNITED STATES OF AMERICA.

No. 31. Twenty years. 20 years.

Otoe County Railroad Bond of 1887. County of Otoe, Territory of Nebraska.

Know all men by these presents, that the County of Otoe, in the Territory of Nebraska, acknowledges itself indebted and bound to the Council Bluffs and St. Joseph Railroad Company in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Council Bluffs and St. Joseph Railroad Company, or their assigns, at the office of Duncan, Sherman & Co., in the city of New York, on the first day of January, in the year one thousand eight hundred and eighty seven, with interest thereon from the

first day of January next after the date hereof at the rate of ten per cent., payable semi-annually at the office of said Duncan, Sherman & Co., in the city of New York, on the first days of July and January in each year, on the presentation and surrender as they fall due of the annexed coupons, or interest warrants, the first payment of interest to be made on the first day of July next ensuing the date of these presents.

This bond is one of a series of one hundred and sixty, of the like tenor and date, one hundred of which are for one hundred dollars, and sixty of which are each for five hundred dollars, in the aggregate amounting to the sum of forty thousand dollars, executed and issued, or to be issued, from time to time, as the wants of said county shall require to pay to the Council Bluffs and St. Joseph Railroad Company, as an appropriation made by said county to said railroad company to aid in the construction of the railroad of said company, to be located in Fremont county, Iowa, through a point most convenient to Nebraska City. This debt is authorized by a vote of the legal voters of said County of Otoe, taken at an election held under and by virtue of an order of the county commissioners of said county, on the 17th day of March, 1866, in pursuance
237 with the several acts of the Legislature of the Territory of Nebraska, in such cases made and provided, and a resolution of the board of county commissioners of said county granting such aid.

In witness whereof, the said county of Otoe has caused this bond to be signed in its behalf by the chairman of the board of county commissioners, and the treasurer, attested by the county clerk, and the seal of said county affixed at the office of the county clerk, at Nebraska City, Nebraska Territory, the twelfth day of November, in the year of our Lord one thousand eight hundred and sixty-six.

Register No. ——.

MILLS S. REEVES, *Treasurer.*
D. M. MARTIN,
Chairman Board of County Com'rs.

Attest:
[SEAL.] ELISHA BENNETT,
County Clerk.

[Endorsement.]

For value received, The Council Bluffs and St. Joseph Railroad Company does hereby assign, set over, and transfer to ———, or bearer, the within bond issued to said railroad company by the county of Otoe, in the State of Nebraska, and does hereby give and convey to said ——— full power to receive all moneys due thereon.

In witness whereof, the president of said Council Bluffs and St. Joseph Railroad Company has set his official signature and affixed the seal of said railroad company, on this day of November 18th, 1869.

COUNCIL BLUFFS & ST. JOSEPH RAILROAD CO.,
By W. PHELPS, *President.*

Upon the back of said petition appear endorsements, in words and figures following, to wit: 235. G. John G. Baldwin *vs.* County of Otoe. Petition. Filed April 1st, 1882. Elmer D. Frank, clerk, by F. E. McCrary, deputy.

238 Thereupon afterwards, to wit, on the 1st day of May, A. D. 1882, an answer was filed in said case; which said answer is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JOHN T. BALDWIN
vs.
THE COUNTY OF OTOE. } Answer.

The Answer of the County of Otoe, Defendant.

I. For a first answer to the plaintiff's petition herein, the said defendant alleges and says that it denies each and every allegation and averment therein contained, except such allegations and averments as shall be expressly admitted in this answer.

II. For a second defense and answer to the first cause of action stated in said plaintiff's petition herein, the said defendant avers and alleges that said first cause of action did not accrue within five years next before the commencement of this action.

Note by clerk Sup. Court U. S.: Here follows 438 defenses of the statute of limitations, omitted in printing the record per stipulation of counsel. See stipulation, page ——.

283 III. For a third defense and answer to the whole of the petition of the said plaintiff herein, the said defendant denies that the County of Otoe, the defendant herein, on the 12th day of November, 1866, or at any other time, made, issued, or delivered to any person or corporation the bonds or coupons, or any of the bonds or coupons mentioned and described in said petition, or in any of the several counts thereof.

This defendant says it is true that the board of county commissioners of said county did make, issue, and deliver to the Council Bluffs and St. Joseph Railroad Company the bonds and coupons described in the plaintiff's petition, and in the several counts thereof, but this defendant says that the said board of county commissioners had no right, power, or legal authority to make, issue, or deliver the same; that the question of the issuing of said bonds was never submitted to the people or voters of said County of Otoe at any time, either at a regular or special election held in said county, nor was the proposition to lay or levy a tax for the payment of said bonds or coupons ever submitted to the people or voters at any such election, and that no such question or proposition has ever been voted or passed upon by the people or voters of said County of Otoe; that said bonds and coupons were a pure

gift, gratuity, and donation by said commissioners to the said Council Bluffs and Saint Joseph Railroad Company, for which this defendant received no consideration whatever, and the said board of county commissioners had no authority from this defendant to make, issue, or deliver said bonds and coupons, or any part thereof, and that the making, issuing, and delivering of said bonds and coupons was "*ultra vires*" and outside and beyond the power, authority of said board of county commissioners of said County of Otoe in the premises, and said bonds and coupons are not binding on this defendant, but are null and void and of no effect; of
284 all of which the said Council Bluffs and St. Joseph Railroad Company had due and full notice when it accepted the same.

And this defendant further says, that the said Council Bluffs and St. Joseph Railroad Company was at the times said bonds were issued and delivered, for a long time before, and still is a railroad company, and corporation incorporated under the laws of the State of Iowa, and having all its railroad lines and railroad tracks wholly in that State, and doing and transacting all of its business therein; that said Council Bluffs and St. Joseph Railroad Company has never had, owned, built, or constructed any railroad in the State of Nebraska, and is a foreign corporation, having all of its railroad and transacting all of its business in the State of Iowa.

And this defendant further says that said Council Bluffs and St. Joseph Railroad Company procured said bonds and coupons from said board of county commissioners of Otoe county by covin, fraud, and misrepresentation, in this that, at or about the time of said bonds were made, issued, and delivered as aforesaid it promised and agreed with said commissioners, that in consideration of said bonds and coupons being so made, as aforesaid, it would build its road through Fremont county, in the State of Iowa, through a point most convenient to Nebraska City, in said county of Otoe, and through the nearest practicable point on the Missouri river opposite Nebraska City aforesaid, not exceeding a distance of sixty rods from said river, and establish a depot at said point on the main line of said road; that it was by, through, and upon these representations and agreements that the said commissioners were induced to and did make, issue, and deliver said bonds and coupons to the said Council Bluffs and St. Joseph Railroad Company; and this defendant says that said Council Bluffs and St. Joseph Railroad Company did not comply with said contract and agreement
285 on its part, but wholly failed to do so in this, that it did not build its road through Fremont county, in the State of Iowa, through a point most convenient to Nebraska City, in said county of Otoe, and through the nearest practicable point on the Missouri river, opposite Nebraska City aforesaid, not exceeding sixty rods from said river, and did not establish a depot at said point on the main line of said road, nor has it at any time since done or performed its said contract and agreement so to have been performed by it as aforesaid, and that said Council Bluffs and St. Joseph Rail-

road Company has willfully and wholly failed to comply with and fulfill its said contract and agreement in pursuance of and in consideration of which it procured said bonds and coupons from said commissioners, and still fails and refuses to do so; and that the plaintiff herein received said bonds and coupons from the said Council Bluffs and St. Joseph Railroad Company, and had full notice of all the facts hereinbefore stated, when he so received the same, and this defendant is informed and believes, and so charges the fact to be, that this plaintiff paid no consideration for said bonds and coupons, but took and received the same with a view to the commencement and prosecution of this suit, and for the purpose or shutting out and defeating the defense hereinbefore set up in behalf of this defendant.

IV. For a fourth defense and answer to the whole of the petition of the said plaintiff herein the said defendant says that the said commissioners of Otoe county did not on the 12th day of November, 1866, nor at any other time have the power or authority to issue the said bonds and coupons, or any other bonds or coupons, for the purpose of building, and aiding a foreign railroad corporation to build and construct a railroad outside the limits of the said county of Otoe or outside the limits of the Territory or the State of Nebraska; that there was at that time no law passed by the Legislature of the Territory of Nebraska authorizing or empowering the county commissioners of Otoe county to make, issue, or deliver to the Council Bluffs and St. Joseph Railroad Company the
286 bonds and coupons described and set forth in said plaintiff's petition.

And this defendant further says that the Territory of Nebraska did not by the act of Legislature of said Territory, entitled "An act to authorize the county commissioners of Otoe county to issue bonds of said county to the amount of one hundred and fifty thousand dollars to the Burlington and Missouri Railroad, or any other railroad, running east from Nebraska City," approved February 15th, 1869, recognize the due issue of said bonds; that said act was unconstitutional and void, and was not retrospective or retroactive, and did not pretend to authorize or legalize any bond or bonds made or issued before passage of said act, to wit, February 15th, 1869.

Wherefore defendant prays that the said plaintiff recover nothing by his said writ; and that this defendant be hence dis arged; ar that it recover judgment for its costs.

O. P. MASON AND I. N. SHAMBAUGH
AND J. C. WATSON,
Attorneys for Defendant.

STATE OF NEBRASKA, }
County of Otoe, } *ss:*

Levi Keim, being first duly sworn, says, he is the chairman of the board of county commissioners of Otoe county, and that he believes the facts stated in the foregoing answer are true.

LEVI KEIM.

Subscribed in my presence, and sworn to before me, by the said Levi Keim, this 29th day of April, 1882.

H. R. WODEHOUSE, [SEAL.]
Notary Public.

Upon the back of said answer appear endorsements, in words and figures following, to wit: No. 235 G. U. S. circuit court, district of Nebraska. John T. Baldwin *vs.* The County of Otoe. 235 G. Answer. O. P. Mason & I. N. Shambaugh and J. C. Watson, attorneys for defendant. Filed May 1, 1882. Elmer D. Frank, clerk.

287 Thereupon afterwards, to wit, on the 20th day of September, 1882, a reply was filed in said case, which said reply is in words and figures as follows, to wit:

In the United States Circuit Court, District of Nebraska.

JOHN T. BALDWIN
vs.
THE COUNTY OF OTOE. } Reply.

Now comes the said plaintiff and denies each and every allegation contained in the second and fourth defenses, or that the question and proposition mentioned and referred to in the third defense was not submitted or voted or passed on by the voters of said defendant county, or that said defendant received no consideration for said bonds, or that the same were *ultra vires*, or were or are illegal or void, or that said railroad company obtained said bonds by covin, fraud, or misrepresentation, or agreed to build said railroad or establish a depot when and as in said answer alleged, or that upon any such representations or agreement the commissioners of said county were induced to, or did issue said bonds, or that said company did not build through Fremont county, Iowa, through a point most convenient to Nebraska City, in the county of Otoe, and through the nearest practicable point on the Missouri river opposite said city, and not exceeding sixty rods from said river, or establish a depot at such point, or has not fully performed all and every the particulars of said alleged contract, or that this plaintiff received said bonds or coupons from said company, or had full or any notice of all or any facts invalidating said bonds or coupons in that behalf alleged in said answer, or paid no consideration therefor, or took or received the same with a view of the commencement or pros-
288 ecution of this suit, or for the purpose of shutting out or defeating any defense of said defendant.

J. M. WOOLWORTH,
Pl'ff's Att'y.

DISTRICT OF NEBRASKA, *ss:*

J. M. Woolworth, being duly sworn, says, that he is the attorney for the plaintiff in the above-entitled action; that said plaintiff is a

non-resident of and absent from said district, and that the facts contained in the foregoing reply are true, as he verily believes.

J. M. WOOLWORTH.

Subscribed in my presence and sworn to before me, this 29th day of September, 1882.

JAMES P. ENGLISH, [SEAL.]
Notary Public.

Upon the back of said reply appear endorsements, in words and figures following, to wit: 235 G. United States circuit court, district of Nebraska. John T. Baldwin *vs.* Otoe county. Reply. Filed Sept. 29, 1882. Elmer D. Frank, clerk.

Thereupon afterwards, to wit, at the November term of said court, an order was entered in said case, as appears of record on folio 64, Journal H, of said court, consolidating said case with the case of John T. Balwin *vs.* Otoe County, number 319 G, which said order is in words and figures as follows, to wit:

JOHN T. BALDWIN
vs.
COUNTY OF OTOE. } 235 G.

On motion it is ordered by the court that this cause be, and the same is hereby, consolidated with case No. 319 G for trial.

289 On the 11th day of August a petition was filed in said case numbered 319 G, which said petition is in words and figures following, to wit:

290 In the Circuit Court of the United States, District of Nebraska.

JOHN T. BALDWIN
vs.
THE COUNTY OF OTOE. } Petition.

John T. Baldwin, plaintiff, complains of The County of Otoe, defendant, and says that he is a resident in and citizen of the State of Iowa, and the defendant is, and, for twenty years and more last past has been, a municipal corporation, created and organized by and under the laws of the late Territory of Nebraska, and since its admission into the Union as a State, has been recognized by the laws thereof, and is a citizen of said State.

On the 12th day of November, 1866, the said defendant made, among others, its nine several bonds, dated on that day, by each whereof it acknowledged itself indebted unto the Council Bluffs and St. Joseph Railroad Company in the sum of five hundred dollars, which sum it thereby promised to pay to said company, or its assigns at the office of the treasurer of said county on the 1st day of January, 1887, with interest thereon, from the 1st day of January next, after the said date thereof, at the rate of ten per cent. per annum,

payable semi-annually, at the same place, on the first days of January and July of each year, on the presentation and surrender as they fall due of coupons or interest warrants thereto severally attached, the first payment of interest to be made on the first day of July next ensuing the date thereof. And it was therein recited in each of said bonds that it was one of a series of one hundred and sixty of the like tenor and date, one hundred of which were for one hundred dollars, and sixty were for five hundred dollars, in the aggregate amounting to $40,000, executed and issued, or to be issued, from time to time, as the wants of said county shall require to pay to said company as an appropriation made by said county to it to aid in the construction of its railroad, to be located in Fremont county, Iowa, through a point most convenient to Nebraska City, in said county, and that said debt was authorized by a vote of the legal voters of said county, taken at an election duly held under and by virtue of an order of the county commissioners of said county on the 17th day of March, 1866, in pursuance of the several acts of the Legislature of the Territory of Nebraska, in such cases made and provided, and a resolution of the board of county commissioners of said county granting such aid, which bonds were duly issued and delivered to said company, and by it assigned in blank; for value, the same were sold and delivered by said company, and has, in due course of business, come to said plaintiff, who has become and is the true and lawful owner and holder thereof, together with the coupons thereto annexed, and without any knowledge of any facts, if any there be, affecting their validity. By an act of the Legislature of said Territory, entitled "An act to authorize the county commissioners of Otoe county to issue the bonds of said county to the amount of one hundred and fifty thousand dollars to the Burlington and Missouri Railroad, or any other railroad running east from Nebraska City," approved February 15th, 1869, the said Territory recognized the due issue of said bonds. The bonds which have so as aforesaid come to the hands of said plaintiff are numbered as follows: 1, 4, 5, 6, 7, 8, 10, 11, and 12, and a copy of one thereof, save its number, is hereto annexed with the endorsement thereon. Said county paid all of the coupons attached to said bonds when the same were issued, except those which matured on and after January 1st, 1870.

291 1. Cause of action: When said plaintiff so as aforesaid became the holder of said bonds, to wit, No. 1, a coupon was attached thereto, which was in the words and figures following, to wit:

COUNTY RAILROAD BOND.

The county of Otoe, in Nebraska Territory, will pay the bearer thereof, on the first day of January, 1878, twenty-five dollars, at the office of the county treasurer, in Nebraska City, for interest due that day on its railroad bond, No. 1.

M. S. REEVES, *Treasurer.*

Whereof, as well as the interest on said bond represented thereby, said plaintiff became then and there the owner and holder. When the same became due the said defendant had not, nor ever had, at the place of payment therein mentioned, any funds applicable to the payment, or any part thereof, and has never paid any part of said coupon or interest, but remains and is indebted to said plaintiff in the full sum of $25, and interest theron, from the day of payment therein mentioned at 10 per cent. per annum.

Note by clerk Supreme Court United States: Here follows 129 causes of action in the same terms, except as to amounts, numbers of bonds, and time of maturity of coupons counted on, omitted in printing the record per stipulation of counsel. See page ——.

325 Said plaintiff purchased the bonds and coupons above mentioned from Mrs. Harriet Phelps, who held the same from a time not more than six months after their date, and until she sold and transferred same to said plaintiff, during all which time she was a married woman.

Wherefore the said plaintiff prays judgment against the said defendant for two thousand four hundred and fifty dollars, and interest, as follows: On $245, from January first, 1878; on $245, from July first, 1878; on $245, from January first, 1879; on $245, from July first, 1879; on $245, from January first, 1880; on $245, from July first, 1880; on $245, from January first, 1881; on $245, from July first, 1881; on $245, from January first, 1882; on $245, from July first, 1882.

J. M. WOOLWORTH,
Pl'ff's Att'y.

DISTRICT OF NEBRASKA, *ss:*

J. M. Woolworth, being duly sworn, says he is attorney for the plaintiff in the above petition; that said plaintiff is a non-resident of said district, and deponent believes the facts stated in said petition are true.

J. M. WOOLWORTH.

Subscribed in my presence and sworn to before me, this 11th day of August, 1882.

J. P. ENGLISH, [SEAL]
Notary Public.

EXHIBIT "A."

No. ——. UNITED STATES OF AMERICA. $500.

Otoe County Railroad Bond of 1887. County of Otoe, Territory of Nebraska.

Know all men by these presents, that the County of Otoe, in the Territory of Nebraska, acknowledges itself indebted and bound to the Council Bluffs and St. Joseph Railroad Company in the sum of

five hundred dollars, lawful money of the United States of
326 America, to be paid to the said Council Bluffs and St. Joseph Railroad Company, or their assigns, at the office of the county treasurer of said county, on the first day of January, in the year one thousand eight hundred and eighty-seven, with interest thereon from the first day of January next after the date hereof, at the rate of ten per cent. per annum, payable semi-annually, at the office of the county treasurer of said county on the first days of July and January in each year, on the presentation and surrender as they fall due of the annexed coupons or interest warrants, the first payment of interest to be made on the first day of July ensuing the date of these presents.

This bond is one of a series of one hundred and sixty of the like tenor and date, one hundred of which are each for one hundred dollars and sixty of which are each for five hundred dollars, in the aggregate amounting to the sum of forty thousand dollars, executed and issued, or to be issued, from time to time as the wants of said county shall require, to pay to the Council Bluffs and St. Joseph Railroad Company as an appropriation made by said county to said railroad company, to aid in the construction of a railroad of said company, to be located in Fremont county through a point most convenient to Nebraska City.

This debt is authorized by a vote of the legal voters of said County of Otoe, taken at an election duly held under and by virtue of an order of the county commissioners of said county on the 17th day of March, 1866, in pursuance with the several acts of the Legislature of the Territory of Nebraska, in such cases made and provided, and a resolution of the board of county commissioners of said county granting such aid.

In witness whereof, the said County of Otoe has caused this bond to be signed in its behalf by the chairman of the board of county commissioners and the treasurer, attested by the county clerk and the seal of said county, affixed at the office of the county
327 clerk in Nebraska City, Nebraska Territory, the twelfth day of November, in the year of our Lord one thousand eight hundred and sixty-six.

MILLS S. REEVES, *Treas.*
D. M. MARTIN,
Register, No. ——— *Chairman Board of County Com'rs.*

Attest:
[SEAL.] ELISHA BENNETT, *County Clerk.*

[Endorsement:] For value received, the Council Bluffs and St. Joseph Railroad Company does hereby assign, set over and transfer to ———, or bearer, the within bond, issued to the said railroad company by the said County of Otoe, in the State of Nebraska, and does hereby give and convey to said ———— power to receive all moneys due thereon.

In witness whereof, the president of said Council Bluffs and St.

Joseph Railroad Company has hereunto set his official signature and affixed the seal of said railroad company on the 18th day of November, 1869.

COUNCIL BLUFFS & ST. JOSEPH RAILROAD,
By W. PHELPS, *President.*

Upon the back of said petition appear endorsements, in words and figures following, to wit: No. 319 G. United States c't c't, district of Nebraska. John T. Baldwin *vs.* Otoe County. Petition. Filed Aug. 11, 1882. Elmer D. Frank, clerk. J. M. Woolworth, pl'ff's att'y.

Thereupon afterwards, to wit, on the 11th day of October, 1882, an answer was filed in said case, which said answer is in words and figures as follows, to wit:

In the Circuit Court of the United States, District of Nebraska.

JOHN T. BALDWIN
vs.
THE COUNTY OF OTOE. } Answer.

And now comes the County of Otoe defendant; and—

I. For a first answer to the plaintiff's petition herein, the
328 said defendant alleges and says that it denies each and every allegation and averment therein contained, except such allegations and averments as shall be expressly admitted in this answer.

II. For a second defense and answer to the said petition of the plaintiff herein, the said defendant denies that the County of Otoe, the defendant herein, on the 12th day of November, 1866, or at any other time, made, issued, or delivered to any person or corporation the bonds or coupons mentioned and described in said petition, or in any of the several counts thereof. This defendant says that it is true that the board of county commissioners of said county did make, issue, and deliver to the Council Bluffs and St. Joseph Railroad Company the bonds and coupons described in the plaintiff's petition and in the several counts thereof, but this defendant says that the said board of county commissioners had no right, power, or legal authority to make, issue, or deliver the same; that the question of issuing said bonds, including the sum desired to be raised, and the amount of tax desired to be levied and the rate per [annum,] and the whole regulation, including the time of its taking effect and having operation, was never published at any time prior to the 17th of March, 1866, or at any other time, in any newspaper published in said county of Otoe, although there was at that time, and for a long time previous thereto, a newspaper regularly published in said county and in general circulation therein; nor was said question ever posted up in any place whatever in any of the election precincts in said county prior to said 17th day of March, 1866, or at any

other time; nor was any question of issuing any bonds to the Council Bluffs and Saint Joseph Railroad Company in any manner or in any form published in any newspaper whatever, or posted in any of the election precincts of said county prior to the 17th day of March, 1866, or at any other time; that no copy of any question to be submitted and voted on by the people of said county at said
329 election was ever posted up at each or any of the several places of voting, in said county, during the day of the 17th of March, 1866. That the question of issuing said bonds was never submitted to the people or voters of said county of Otoe at any time, either at a regular or a special election held in said county, nor was the proposition to lay or levy a tax for the payment of said bonds or coupons ever submitted to the people or voters of said county at any such election, and that no such question or proposition has ever been voted or passed upon by the people or voters of said county; that said bonds and coupons were a mere gift, gratuity, and donation by said commissioners to said Council Bluffs and Saint Joseph Railroad Company, for which this defendant received no consideration whatever, and the said board of county commissioners had no authority from this defendant to make, issue, or deliver said bonds and coupons, or any part thereof, and that the making, issuing, and delivering of said bonds and coupons was "*ultra vires*," and outside of the power and beyond the authority of said board of county commissioners of said county of Otoe in the premises, and said bonds are not binding or obligatory on this defendant, but are null and void and of no effect; of all of which the said Council Bluffs and Saint Joseph Railroad Company had due and full notice when it accepted the same, and of all of which the said plaintiff had due and full notice before the time of the alleged assignment of the same.

And this defendant further says that the said Council Bluffs and Saint Joseph Railroad Company was at the time said bonds were issued and delivered, for a long time before, and still is a railroad company and incorporation, incorporated under the laws of the State of Iowa, and having all its railroad lines and railroad tracks wholly in that State and doing and transacting all of its business therein; that said Council Bluffs and Saint Joseph Railroad
330 Company has never owned or constructed any railroad in the State of Nebraska, but is a foreign corporation, having all of its railroad and transacting all of its business in the State of Iowa. And this defendant further says that the said Council Bluffs and St. Joseph Railroad Company procured said bonds and coupons from said board of county commissioners of Otoe county by covin, fraud, and misrepresentations, in this, that at or about the time that said bonds were issued and delivered as aforesaid, it promised and agreed with said commissioners that, in consideration of said bonds and coupons being made as aforesaid, it would build its road through Fremont county, in the State of Iowa, through a point most convenient to Nebraska City, in said county of Otoe, and

through the nearest practicable point on the Missouri river opposite Nebraska City aforesaid, not exceeding a distance of sixty (60) rods from said river, and establish a depot at said point on the main line of said road; that it was by, through, and upon these representations and agreements that the said commissioners were induced to and did make, issue and deliver to said Council Bluffs and Saint Joseph Railroad Company the said bonds and coupons. And this defendant says that said Council Bluffs and Saint Joseph Railroad Company did not comply with said contract on its part, but wholly failed to do so, in this, that it did not build its road through Fremont county, in the State of Iowa, to a point most convenient to Nebraska City, in said county of Otoe, and through a point the nearest practicable point on the Missouri river opposite Nebraska City aforesaid, not exceeding sixty (60) rods from said river, and did not establish a depot on said point on the main line of said road, nor has it at any time *at any time* since done or performed its said contract and agreement so be done and performed by it as aforesaid; but the said Council Bluffs and Saint Joseph Railroad Company has willfully and wholly failed to comply with and fulfill its said contract and agreement, in pursuance of and in con-
331 sideration of which it procured said bonds and coupons from said commissioners, and still fails and refuses to do so; and that the plaintiff herein received said bonds and coupons from the said Council Bluffs and Saint Joseph Railroad Company, and had full notice of all of said facts hereinbefore stated when he so received the same; and this defendant is informed and believes, and so charges the fact to be, that this plaintiff paid no consideration for said bonds and coupons, and took the same with a view to the commencement of this action, and for the purpose of shutting out and defeating the defense hereinbefore set up in behalf of this defendant.

III. For a third defense and answer to the petition of the said plaintiff herein, the said defendant says that the said commissioners of Otoe county did not, on the 12th day of November, 1866, nor at any other time, have the power or authority to issue the said bonds and coupons, or any other bonds or coupons, for the purpose of building and aiding a foreign corporation to build or construct a railroad outside of the limits of the said county of Otoe, or outside the limits of the Territory or State of Nebraska; that there was no law at that time passed by the Legislature of the Territory of Nebraska authorizing or empowering the county commissioners of said county of Otoe to make or deliver to the Council Bluffs and Saint Joseph Railroad Company the bonds and coupons described and set forth in plaintiff's petition.

And this defendant further says that the Territory of Nebraska did not, by the act of the Legislature of said Territory, entitled "An act to authorize the county commissioners of Otoe county to issue bonds of said county to the amount of one hundred and fifty thousand dollars to the Burlington and Missouri River Railroad

Company or any other railroad company or any other railroad running east from Nebraska City," approved February 15th
332 1869, recognize the due issue of said bonds; that said act was unconstitutional and void, and was not retrospective or retroactive, and did not pretend to authorize or legalize any bond or bonds made or issued before the passage of said act, to wit, February 15th, 1869.

Wherefore defendant prays that the said plaintiff recover nothing by his said writ, and that this defendant be hence discharged, and that it recover judgment for its costs.

O. P. MASON,
I. N. SHAMBAUGH, AND
WATSON & WODEHOUSE,
Attorneys for Defendant.

STATE OF NEBRASKA, }
County of Otoe, } *ss:*

Levi Keim, being first duly sworn, says he is the chairman of the board of county commissioners of said county, and that he believes the facts stated in the foregoing answer are true.

LEVI KEIM.

Subscribed in my presence and sworn to before me, this 9th day of October, A. D. 1882.

P. R. STALEY, [SEAL.]
Notary Public.

Upon the back of said answer appear endorsements, in words and figures following, to wit: No. 319 G. United States circuit court, district of Nebraska. John T. Baldwin *vs.* The County of Otoe. Answer. O. P. Mason, I. N. Shambaugh, and Watson & Wodehouse, for def't. Filed Oct. 11, 1882. Elmer D. Frank, clerk. By A. L. Frank, deputy.

333 Thereupon afterwards, to wit, on the 23d day of October, 1882, a reply was filed in said case, which said reply is in words and figures as follows, to wit:

In the United States Circuit Court, District of Nebraska.

JOHN T. BALDWIN
vs.
THE COUNTY OF OTOE. } 319 G.—Reply.

Now comes the said plaintiff and denies each and every allegation contained in the second and third defenses, or that the question and proposition mentioned and referred to in the second defense was not submitted, or voted, or passed on by the voters of said defendant county, or that said defendant received no consideration for said bonds, or that the same were *ultra vires*, or were or are illegal or void, or that the said railroad company obtained said bonds by covin, fraud, or misrepresentation, or agreed to build said railroad

or establish a depot when and as in said answer alleged, or that upon any such representations or agreement the commissioners of said county were induced to or did issue said bonds, or that said company did not build through Fremont county, Iowa, through a point most convenient to Nebraska City, in the county of Otoe, and through the nearest practicable point on the Missouri river opposite said city, and not exceeding sixty rods from said river, or has not fully performed all and every the particulars of said alleged contract, or that this plaintiff received said bonds, or coupons, from said company, or had full or any notice of all or any facts invalidating said bonds, or coupons, in that behalf, alleged in said answer, or paid no consideration therefor, or took or received the
334 same with a view to the commencement or prosecution of this suit, or for the purpose of shutting out or defeating any defense of said defendant.

J. M. WOOLWORTH,
Att'y for Pl'ff.

DISTRICT OF NEBRASKA, *ss:*

J. M. Woolworth, being sworn, says, I am the attorney for the plaintiff in the above-entitled action; said plaintiff is a non-resident of and absent from said district; that the facts contained in the foregoing reply are true, as he verily believes.

J. M. WOOLWORTH.

Subscribed in my presence and sworn to before me, this 23d of October, 1882.

JAMES P. ENGLISH, [SEAL.]
Notary Pub'

Upon the back of said reply appearendorsements, in words and figures following, to wit: 319 G. United States circuit court, district of Nebraska. John T. Baldwin *vs.* The County of Otoe. Reply. Filed Oct. 23, 1882. Elmer D. Frank, clerk, by All. Frank, deputy. J. M. Woolworth, pl'ff's att'y.

335 Thereupon afterwards, to wit, on the 19th day of May, 1883, there was filed in said case a certificate of division of the judges, which said certificate is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JOHN T. BALDWIN
vs.
THE COUNTY OF OTOE. } Certificate of Division of the Judges.

Be it remembered that this cause came on to be tried before the circuit and district judges, the parties having waived a jury by a writing signed by their respective counsel, and filed with the clerk before they entered upon the trial, and in the course thereof the following questions arose for determination, that is to say:

First. Whether the commissioners of the defendant had the power to issue bonds under either of the statutes, copies of which are hereto attached, marked "A" and "B," without first giving four weeks' notice of the election, as provided by section 26 of act marked "B," so that the same would be good and valid in the hands of a *bona fide* holder?

Second. If the power to issue bonds existed under either of said statutes, was it a defense available to the county against a *bona fide* holder of the bonds in suit, that the election, in pursuance of which they were issued, was for the purpose of determining whether the county should issue its bonds to the amount of $200,000, for the purpose of securing an eastern connection for Nebraska City, when only $40,000 was issued under said vote?

Third. The order for the election not providing for the submission of a provision to levy a tax, as required by section 27 of the act marked "B," should it be presumed that the proposition
336 to issue the bonds submitted and voted on at an election was not accompanied by a provision to lay the tax as required in said act, and if such presumption is to be indulged, was the presumed fact a defense available to the county against a *bona fide* holder of the bonds?

Fourth. Was it a defense available to the county against a *bona fide* holder, that the bonds in suit, after being issued in pursuance of a vote held under one or both of said acts, were donated to the railroad company, provided it were located within one and one-half miles of Nebraska City?

Fifth. If originally illegal and void, were the bonds validated by the acts, copies of which are hereto attached, marked "C" and "D"?

The circuit judge being of the opinion that, all of said questions notwithstanding, judgment should be for the plaintiff, and the district judge being of the contrary opinion, it is ordered that judgment be entered for plaintiff, and the said questions be certified to the supreme court for its consideration and answer. Questions certified to supreme court at the request of counsel.

GEO. W. McCRARY,
Circuit Judge.
ELMER S. DUNDY,
Judge.

"A."

AN ACT to authorize Otoe county to subscribe and take stock in any railroad in Fremont county in the State *in the State* of Iowa.

SEC. 1. *Be it enacted by the Council and House of Representatives of the Territory of Nebraska*, That the board of county commissioners for Otoe county may at any time, by an order of said board, cause an election to be held for the purpose of ascertaining the will of
337 the people of Otoe county as to the propriety of said county subscribing stock for any amount not exceeding seventy-five

thousand dollars, to any railroad company for the purpose of constructing any railroad now, or hereafter, to be located in Fremont county and State of Iowa.

SEC. 2. If a majority of the legal voters of said county shall vote in favor of such proposition, then the board of county commissioners of Otoe county shall issue the bonds of said county for whatever amount of stock it may have decided upon by such vote to any such railroad company, which bonds shall not bear any greater interest than ten per cent. per annum.

SEC. 3. This act shall take effect and be in force from and after its passage.

Approved January 6th, 1860.

338 EXHIBIT B.

AN ACT to define the powers and duties of County Commissioners and County Clerks.

SEC. 1. *Be it enacted by the Council and House of Representatives of the Territory of Nebraska*, That there shall be a board of county commissioners, consisting of three persons in each organized county in this Territory. Said commissioners shall have the qualifications of electors, and shall be elected by the qualified voters of the several counties respectively at the annual general election; and when a vacancy occurs in the office of county commissioner, sixty days or more before the expiration of his term of office as hereinafter provided, the vacancy shall be filled by a special election.

§ 2. Each county shall be divided into three districts by the first board of county commissioners elected under the provisions of this act, which districts may be numbered from one to three; and said districts shall not be changed oftener than once in three years by said board. The board of commissioners, at their first session after their election under this act, shall proceed to divide their respective counties into districts as provided in the first part of this section, and one commissioner shall be elected from one of said districts at each general election thereafter, by the qualified voters of the whole county, provided that it shall not be lawful to change said district lines without a full board of commissioners existing at the time said lines are changed.

§ 3. At the first election held to choose the board of commissioners under this act for any county, the person at the first election having the highest number of votes shall continue in the office for three years, the next highest three years, and the next highest one year; but if any two or more persons have the same number of votes, their term of office shall be determined by the board of canvassers, and each commissioner elected at the first general election in pursuance of this act shall hold his office for three, two and one years as the case may be, and until his successor shall be duly elected and qualified, and each commissioner elected thereafter in pursuance of

the second section of this act shall hold his office for three years, and until his successor shall be elected and qualified.

§ 4. Each person elected county commissioner shall, on receiving a certificate of his election, take an oath before some officer qualified to administer oaths, that he will support the Constitution of the United States and organic act of this Territory, and perform faithfully all the duties enjoined by this act, which oath shall be certified to by the officer administering the same, under seal, and filed in the office of register of deeds for said county for record in a book kept for that purpose, and when so recorded shall be sufficient authority for such commissioners to act.

§ 5. The county commissioners shall meet and hold sessions for the transaction of county business at the court-house in their respective counties, or at the usual place of holding courts on the first Monday in January, April, July, and October of each year, and may adjourn from time to time for the transaction of business; and the county clerk shall have the power to call special sessions when the interest of the county demands it, upon giving five days' notice of the time and object of calling the commissioners together, by posting up notice in three public places in the county, or by publication in one newspaper in the county.

§ 6. The county clerk shall attend the sessions of said commissioners, and keep a true and full record of all their proceedings in a book to be provided for that purpose, and the sheriff of the county shall also, by himself or deputy, attend their sessions and execute their orders.

§ 7. When two only of the commissioners of the board shall attend and shall be divided on any question, they shall defer a decision until the next meeting of the board, and then the matter shall be decided by a majority of the board.

§ 8. Copies of their proceedings, duly certified and attested by the county clerk under seal, shall be received as evidence in all courts in this Territory.

339 § 9. Any of said commissioners or the county clerk shall have power and authority to administer oaths or affirmations in all cases, and said commissioners shall have power to preserve order when sitting as a board, and may punish contempts by fine not exceeding five dollars, or by imprisonment in the county jail not exceeding twenty-four hours; they may force obedience to all orders made by them, by attachment or other compulsory process, and when fines are assessed by them the same may be collected before any justice of the peace having jurisdiction, and shall be paid over as other fines, within ten days after they are collected.

§ 10. It shall be the duty of the county commissioners to allow, and caused to be audited by their clerk, all claims against the county, and the oldest commissioner shall draw all warrants on the treasurer for money to be paid out of the county treasury, which warrant shall be countersigned by the county clerk and sealed with the county seal. It shall be their duty to settle with the county

treasurer, or with any and all persons who have received moneys belonging to the county or to the common school fund of the county, and to cause their accounts to be audited by the county clerk. They shall have power to issue a citation to any county officer who is charged with malfeasance, or nonfeasance, or misfeasance, to show cause why he should not be removed from office, and to remove from office all county officers who shall be found by them guilty of corruption, extortion, bribery, or willful neglect of duty.

§ 11. The said commissioners shall keep a distinct account with the treasurer of the county for each several terms for which the treasurer may be elected, in a book to be provided for that purpose, commencing from the day on which the treasurer became qualified, and continuing until the same, or another person, is qualified as treasurer, in which account they shall charge the treasurer with all sums paid him, and for all sums for which the said treasurer is accountable to the county, and they shall credit him with all orders returned and cancelled, with all moneys paid, and with all vouchers presented by him and with all matters with which the treasurer is to be credited in account, and the said commissioners shall, in their settlement with the treasurer, keep the general, special, and road tax separate, that any citizen of the county may see how the same has been expended.

§ 12. They shall keep a book in which all orders and decisions made by them shall be recorded, except those relating to roads and bridges, and all orders for the allowance of money from the county treasurer, shall state on what account and to whom the allowance is made, dating the same and numbering them consecutively as allowed from the first day of January to the thirty-first day of December each year.

§ 13. They shall keep a book for the entry of all proceedings and adjudications relating to the establishment, change, or discontinuance of roads.

§ 14. They shall keep a book for the entry of warrants on the county treasurer, showing number, date, amount, and name of the drawee of each warrant drawn on the treasury, which may be known as the warrant book; and the warrants shall be numbered in relation to the order and decision allowing the amount for which the same is drawn.

§ 15. They shall have power to institute and prosecute civil actions in the name of the county for and on behalf of the county.

§ 16. Said commissioners shall have the power to make all orders respecting the property of the county, to sell the public grounds of the county, and to purchase other grounds in lieu thereof; and for the purpose of carrying out the provisions of this section, it shall be sufficient to convey all the interest of the county in such grounds, when an order is made for the sale and a deed is executed in the name of the county, by the oldest commissioner, reciting the order, and signed and acknowledged by him for and on behalf of the county, before some officer authorized to take acknowledgment of

deeds: Provided, however, that the question of the sale of such public grounds or lands shall be first submitted to a vote of the people of the county, as hereinafter provided and sanctioned by a majority vote thereof.

Second. They shall have power to levy a tax not exceeding the amount now authorized by law to defray county expenses, and to liquidate county indebtedness.

Third. To audit the accounts of all officers having the care, management, collection or disbursement of any money belonging to the county, or appropriated for its benefit.

§ 17. Said commissioners shall superintend the fiscal concerns of the county, and secure their management in the best manner. They shall keep an account of the receipts and expenditures of the county, and on the first Monday of July, annually, they shall cause a full and accurate statement of the assessments, receipts, and expenditures of the preceding year to be made out in detail under separate heads with an account of all debts payable to and by the county treasurer, and they shall have the same printed in at least one newspaper in their county, and if there be no paper in the county, the same shall be posted up at the usual place of holding their sessions, and at one public place in each precinct of the county.

§ 18. The said commissioners are authorized to procure for their county, a copy of the field notes, as soon as practicable, of the original survey of their county by the United States, and cause a map of the county to be constructed therewith on a scale of not less than one inch to a mile, and laid off into congressional townships and sections, to be kept open in the office of the county clerk, and the field notes to be deposited in the same office.

§ 19. The county commissioners in each organized county in this Territory, shall procure or cause to be procured, a book, which shall be called an "entry book," and said county commissioners shall direct their clerk to obtain and record in said entry book a list of each tract of land situated in their respective counties, beginning with section No. 1, and numbering up to section No. 36, in each congressional township, which list shall state the names of the persons who may have entered the land, and the date of the purchase from the United States.

§ 20. All pieces or parcels of land not sold by the United States, shall be recorded in said entry book in the smallest subdivision entered on the books in the land office; and the county clerk shall, on or before the 25th day of February, of each year, procure a list of the lands situated in the county, which may have been sold during the previous year, and enter on the entry book opposite the description of the land, the name of the person entering the same, and the date of the entry.

§ 21. It shall be the duty of the county clerk of each county to keep a book upon which shall be entered all transfers of real estate situated in said county, which entry shall contain a description of

the tract of land sold, names of parties, date of deed, and date of transfe r.

§ 22. No deed of conveyance shall hereafter be recorded by the county register, until said deed shall be presented to the county clerk, and the tract or tracts of land therein mentioned, by him entered on the transfer book, as specified in the preceding section, and such clerk shall enter on the back of the deed of conveyance the date of the transfer, and said county clerk shall be entitled to receive from the person having such transfer made the sum of ten cents, for each tract of land conveyed in said deed.

§ 23. If the county register shall record any conveyance before the endorsement of the clerk thereon that the transfer has been made, he shall be liable to pay to the county clerk the sum of ten dollars by civil action.

§ 24. The said commissioners shall have power to submit to the people of the county, or at any regular or special election, the question whether the county will borrow money to aid in the construction of public buildings; the question whether the county will aid or construct any road or bridge, or to submit to the people of the county any question involving an extraordinary outlay of money by the county; and said commissioners may aid any enterprise designed for the benefit of the county as aforesaid, whenever a majority of the people thereof shall be in favor of the proposition as provided in this section.

§ 25. When county warrants are at a depreciated value, the said commissioners may, in like manner, submit the question
341 whether a tax of a higher rate than that provided by law, shall be levied, and in all cases when an additional tax is laid in pursuance of a vote of the people of the county, for the special purpose of repaying borrowed money, or of constructing or ordaining to construct any road or bridge, or for aiding in any enterprise contemplated by the 21st section of this act, such special tax shall be paid in money and in no other manner.

§ 26. The mode of submitting the questions to the people, contemplated by the last two sections, shall be the following: The whole question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect or having operation, if it be of a nature to be set forth, and the penalty of its violation, if there be one, is to be published at least for four weeks in some newspaper published in the county. If there be no such newspaper the publication is to be made by being posted up in at least one of the most public places in each election precinct in the county, and in all cases the notices shall name the time when such question shall be voted upon, and the form in which the question shall be taken, and a copy of the question submitted shall be posted up at each place of voting during the day of election.

§ 27. When the question submitted involves the borrowing or expenditure of money, the proposition of the question must be accom-

panied by a provision to lay a tax for the payment thereof, in addition to the usual taxes under section sixteen of this act; and no vote adopting the question proposed shall be valid, unless it likewise adopt the amount of tax to be levied to meet the liability incurred.

§ 28. The rate of tax levied in pursuance of the last four sections of this act shall, in no case, exceed more than three mills on the dollar, of the county valuation in one year. When the object is to borrow money to aid in the erection of public buildings, as provided, the rate shall be such as to pay the debt in ten years. When the object is to construct, or aid in constructing any road or bridge, the annual rate shall not exceed one mill on a dollar of the valuation; and any special tax or taxes levied in pursuance of this act, becoming delinquent, shall draw the same rate of interest as ordinary taxes levied in pursuance of the revenue law of this Territory.

§ 29. The said commissioners being satisfied that the above requirements have been substantially complied with, and that a majority of the votes cast are in favor of the proposition submitted, shall cause the same to be entered at large upon the book containing the record of their proceedings; and they shall then have power to levy and collect the special tax in the same manner that the other county taxes are collected. Propositions thus acted upon cannot be *be* rescinded by the board of county commissioners.

§ 30. Money raised by the county commissioners in pursuance of the last six sections of this act, is specially appropriated and constituted a fund distinct from all others in the hands of the county treasurer, until the obligation assumed is discharged.

§ 31. The said commissioners shall hold their sessions with open doors, and transact all business in the most public manner, and where the county has no court-house, or the court-house shall be unfit or inconvenient, they may hold their sessions for the transaction of business at any other suitable place at the county seat. All matters pertaining to the interest of the county shall be heard by the board of commissioners in session only, but they may continue any business from any regular session to an intermediate day.

§ 32. The books required to be kept by this act shall constitute the record of the board of county commissioners.

§ 33. Said commissioners shall have authority and power to provide for the erection and repairing of court-houses, jails, and other necessary buildings within and for the use of the county; and to carry out the provisions of this section they shall have power to make contracts on behalf of the county for the building or repairing the same. They shall determine the amount of taxes to be levied for county purposes according to the provisions of this act, and the revenue law of this Territory.

342 § 34. The counties in this Territory may sue and be sued, plead and be impleaded in any court in this Territory, and in all cases where lands have been granted to any county for public purposes, and any part thereof has been sold and the purchase

money, or any part thereof shall be due and unpaid, all proceedings necessary to be had to recover possession of such lands, or to enforce the payment of the purchase money, shall be instituted in the name of the proper county.

§ 35. Said commissioners shall have power to employ an attorney by the year, who shall be known as county attorney. But said commissioners shall in no case pay said attorney more than one hundred dollars per annum.

§ 36. When any judgment is obtained against the county, it shall be a lien upon the property of the county, and the public property shall be liable therefor, but no execution shall issue thereon, until the board of county commissioners shall have had six months' time to assess and collect a sufficient amount of revenue under the provisions of this act, to pay off and discharge said judgment or judgments, in addition to the ordinary expenses of the county.

§ 37. From all decisions of the board of commissioners upon matters properly cognizable before them, there shall be allowed an appeal to the district court by any person aggrieved, upon filing a bond with sufficient penalty, with one or more sureties, to be approved by the county clerk, conditioned that the appellant will prosecute his or her appeal without delay and pay all costs that he or she may be adjudged to pay in said district court—said bond shall be executed to the county and may be sued upon in the name of the county upon breach of any condition therein

§ 38. Said appeal shall be taken within twelve days after the decision of said board by serving a written notice on one of the board of county commissioners, and the county clerk shall, upon the filing of the bond and the payment of his fees, allowed by this act as hereinafter provided, make out a complete transcript of the proceedings of said board relating to the matter of their decision thereon, and shall deliver the same to the clerk of the district court.

§ 39. Said appeal shall be filed by the first day of the district court next after such appeal, and said cause shall stand for trial at such term.

§ 40. All appeals thus taken to the district court shall be docketed as other causes pending therein, and the same shall be heard and determined "*de novo.*"

§ 41. The district court may make a final judgment and cause the same to be executed, or may send the same back to the board with an order how to proceed, and require said board of county commissioners to comply therewith by mandamus or attachment, as for contempt.

§ 42. All treasurers, sheriffs, clerks, constables, and other officers, chargeable with moneys belonging to any county, shall render their accounts to and settle with the county commissioners at each stated time thereof, and pay unto the county treasury any balance which may be due the county, take duplicate receipts therefor, and deposit one of the same with the clerk of the county within five days thereafter.

§ 43. If any person thus chargeable shall neglect or refuse to render true accounts or settle as aforesaid, the county commissioners shall adjust the accounts of such delinquent according to the best information they can obtain, and ascertain the balance due the county, and order suit to be brought in the name of the county therefor.

§ 44. In such case the board of commissioners shall refuse such delinquent any commission, and such delinquent shall forfeit and pay to the county twenty per cent on the amount found due the county.

§ 45. It shall be the duty of the county clerks to do, perform, and transact all county business without any extra or greater compensation than is allowed by law. Said clerk shall keep all the books required by this act to be kept, shall file and preserve in his office all accounts, vouchers, and other papers pretaining to the settlement of any and all accounts to which the county shall be a party, copies whereof, certified under the hand and seal of the clerk, shall be admitted as evidence in all courts in this Territory.

343

§ 46. The board of county commissioners hereby established shall procure and keep a seal with such emblems and devices as they may think proper, which shall be the seal of the county, and no other seal shall be used by the county clerk.

§ 47. The impression of the seal hereby required to be kept, by stamp, shall be a sufficient sealing in all cases where sealing is required.

§ 48. The county clerk shall have power and authority to take the acknowledgments of deeds and other instruments of writing, and shall have all the power of a notary public according to the laws of this Territory. And said clerk shall be allowed ten cents for each hundred words copied, certified to by him, and twenty-five cents for each certificate and seal required of him, which does not pertain to the business of the county.

§ 49. The county clerks shall *ex officio* be register of deeds in and for their respective counties from and after the next general election to be held in this Territory for the election of county officers, and the said county clerks shall keep the books and record all instruments now or hereafter required to be recorded by any law of this Territory, in the same manner that the law requires the register of deeds to keep the same. And the said clerks shall receive the same compensation for recording deeds and other instruments of writing, as is now allowed county recorders, or such compensation as may by law be prescribed from time to time.

§ 50. The office of register of deeds is hereby abolished from and after the second Tuesday in October, A. D. 1861: Provided that the present register of deeds shall hold the office until the election and qualification of a county clerk under the provisions of this act; and the register of deeds in and for their respective counties shall, after said day last aforesaid, hand and pass over to the county clerks of their respective counties, all the books, records, and papers pertain-

ing to their office, and it shall be the duty of said county clerks to keep the records of their office in a fire-proof iron safe, to be kept for the purpose, and which shall be purchased by the county commissioners, when in their judgment the same shall be advisable.

§ 51. This act shall take effect and be in force from and after its passage; but nothing herein contained shall be construed to legislate the present commissioners out of office. The said commissioners of the respective counties in this Territory shall continue to hold their offices the same as if this act had not been passed.

§ 52. All acts and parts of acts inconsistent with this act are hereby repealed.

Approved January 11th, 1861.

EXHIBIT C.

AN ACT to enable counties, cities, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in this State, and to legalize bonds already issued for such purpose.

SEC. 1. *Be it enacted by the Legislature of the State of Nebraska*, That any county or city in the State of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad or other work of internal improvement, to an amount to be determined by the county commissioners of such county or the city council of such city, not exceeding ten per centum of the assessed valuation of all taxable property in said county or city: Provided, the county commissioners, or city council, shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county or city, in the manner provided by chapter nine of the revised statutes of the State of Nebraska, for submitting to the people of a county, the question of borrowing money.

§ 2. The proposition of the question must be accompanied by a provision to levy a tax for the payment of the principal and interest of said bonds in addition to the usual taxes, and sufficient to meet the payment of the principal and interest of said bonds, and to continue from year to year until said bonds are paid.

344 § 3. The proposition shall state the rate of interest such bonds shall draw, and when the principal and interest shall be made payable.

§ 4. Upon a majority of the votes cast being in favor of the proposition submitted, the county commissioners, in the case of a county, and the city council, in the case of a city, shall cause the proposition and the result of the vote to be entered upon the records of said county or city, and a notice of its adoption to be published for two successive weeks in any newspaper in said county or city, if there be one, and if not, then without such publication; and shall thereupon issue said bonds, which shall be and continue a subsisting debt against such county or city, until they are paid or discharged.

§ 5. It shall be the duty of the proper officers of such city or county

to cause to be annually levied, collected, and paid to the holder of such bonds a special tax upon all the taxable property within said county or city, sufficient to pay the annual interest and finally to pay the principal thereof, which tax, when levied, shall be a lien upon all the taxable property in said county or city, and shall be collected in the same manner as the ordinary tax of county or city.

§ 6. Any county or city which shall have issued its bonds in pursuance of this act shall be estopped from pleading want of consideration therefor, and the proper officers of such county or city may be compelled by mandamus or otherwise to levy the tax herein provided to pay the same.

§ 7. Any precinct in any organized county of this State shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon the counties and cities by provisions of this act; and in such case the precinct election shall be governed in the same manner as is provided in this act, so far as the same is applicable, and the county commissioners shall issue special bonds for such precinct, and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bond shall be the same as other bonds, and shall contain a statement showing the special nature of such bonds.

§ 8. All bonds heretofore voted and issued by any county or city in this State to aid in the construction of any railroad or other work of internal improvement, are hereby declared to be legal and valid, and a lien upon all the taxable property in such county or city, notwithstanding any defect or irregularity in the submission of the question to a vote of the people, or in taking the vote or the execution of such bonds, and notwithstanding the same may not have been voted upon, executed, or issued in conformity with law, such bonds shall have the same legal validity and binding force as if they had been legally authorized, voted upon, and executed. Provided that nothing in this section shall be so construed as to legalize or in any way sanction any vote of the people of Nemaha county heretofore had, for the purpose of aiding in the construction of any railroad, nor anything done by the county commissioners of said county authorizing said vote, or anything done by them in consequence of such vote.

§ 9. All acts or parts of acts inconsistent with this act are hereby repealed.

§ 10. This act shall take effect and be in force from and after its passage.

Approved February 15th, 1869.

345 Thereupon afterwards, at the May term of said court, on the 19th day of May, 1883, the following proceedings were had, as appears of record on folio 622, Journal H, of said court, to wit:

Judgment. Two Cases Consolidated, Nos. 235 and 319.

JOHN T. BALDWIN *vs.* THE COUNTY OF OTOE.

This cause, being two actions consolidated by order of the court, came on to be tried before the circuit and district judges. The parties having waived a trial by jury, by stipulation in writing filed with the clerk before the trial began, and the parties having submitted their evidence, and the court having heard the argument of counsel, finds for the defendant upon all the causes of action pleaded by the plaintiff, upon coupons which were more than five years past due when these actions were brought, and upon all other causes of action pleaded by the plaintiff in the said two several actions, the court finds for the plaintiff, and assesses his damages at nineteen thousand five hundred and thirty-seven dollars and sixty-five cents.

Whereupon it is ordered, considered, and adjudged that the plaintiff have and recover of the defendant the said sum of nineteen thousand five hundred and thirty-seven dollars and sixty-five cents, together with costs of suit taxed at $——.

346 Thereupon afterwards, to wit, on the 27th day of June, A. D. 1883, a bill of exceptions was filed in said case, which said bill of exceptions is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JOHN T. BALDWIN, Plaintiff,
vs.
THE COUNTY OF OTOE, Defendant.

Be it remembered, that on the trial of this cause in the above-named court, before Hon. George W. McCrary and Hon. Elmer S. Dundy, judges of said court, at the November, 1882, term thereof, to wit, on the 18th day of November, 1882, the plaintiff to maintain the issues on his part, offered in evidence the bonds and coupons sued on in this action; said bonds and coupons are attached, marked A, and made a part of this bill of exceptions.

The plaintiff thereupon rested.

The defendant, to maintain the issue on its part, called as a witness Lewis Dunn, who being duly sworn, testified as follows:

1. Mr. Dunn, what official position do you hold in Otoe county?

Answer. I am county clerk, and have been such for the three years last past.

2. Have you examined the records of the county commissioners of Otoe county relative to the bonds in controversy?

A. I have.

3. Have you a transcript of those proceedings?

A. I have.

4. Is the paper I now hand you such transcript?

A. It is.

The defendant thereupon offered in evidence the transcript aforesaid, which is hereto attached, marked Exhibit B, and made a part hereof, to which the plaintiff objected as immaterial and not the best evidence.

5. You may state, Mr. Dunn, if that transcript of the record shows everything of record relating to the issue of the bonds in this suit.

347 A. After a careful and thorough examination of the records, this is everything I could find.

6. Will you fix the date for which you examined the records?

A. All the years, from 1860 to 1869.

7. You are the proper custodian of the county commissioners' records?

A. I am.

The defendant thereupon rested.

And afterwards, upon a stipulation hereto annexed, and by leave of the court, on the 5th day of April, 1883, the following was had and done:

In accordance with a stipulation in this case, filed March 28th, 1883, on Thursday, April 5th, 1883, the following testimony was taken in the cause; and by the further agreement between counsel on both sides, (the same being made on April 5th, 1883,) the testimony was taken at the office of J. M. Woolworth, attorney-at-law, in the city of Omaha and district of Nebraska, the oath being administered to the witness named below by J. P. English, notary public, and the testimony being taken by Oscar A. Mullon, stenographer, and by him reduced to writing, as follows: The signing of the deposition being waived by J. M. Woolworth, attorney for the plaintiff in the cause, and J. C. Watson, attorney for the defendant in the cause, the said testimony of the said John T. Baldwin being as follows:

JOHN T. BALDWIN sworn and examined by WOOLWORTH:

1. Are you the plaintiff in this suit?

A. Yes, sir.

2. State whether or not you ever purchased the bonds and coupons in this action.

A. I did.

3. When?

A. About the first of November, 1880.

4. Who from?

A. I purchased them from Henry Phelps; that is, I done my negotiating, trading with him.

5. Who was the owner of the bonds?

A. The bonds belonged to his wife, Mrs. Harriet Phelps.

348 6. What did you pay for them?

A. I paid 50 cents on the dollar for the bonds and interest.

7. Who were the bonds and coupons delivered to?

A. They were delivered to me by an order on Robert Percival; and he was holding them as attorney for Mrs. Phelps for collection.

Cross-examined by Mr. WATSON.

8. How many did you purchase?

A. I purchased $28,500.

9. Did they give any reason why they wished to sell them for 50 cents on the dollar?

A. No, they did not particularly.

10. Did you make any inquires why they were offering them at that price?

A. No, sir.

11. Did you understand there was any defense to these bonds?

A. I did not; I understood they were discredited.

12. Did not Mr. Phelps tell you about the decision of the supreme court of Nebraska, in regard to the bonds?

A. No, sir.

13. The coupons were attached to the bonds at that time?

A. Yes, sir.

14. Past due?

A. Yes, sir; I think they were.

15. How many did you purchase?

A. $28,500.

16. Had you ever any conversation with Judge Mason about these bonds before you purchased them?

A. I did not, sir.

17. Did not Judge Mason in a conversation with you, before you purchased them, request you to buy them and bring action so as to make a test suit on them for his benefit?

A. He did not.

17. You never had a conversation with him at all?

A. No, sir; not until after I sued the bonds.

19. How came you to buy these bonds; was it at the solicitation of this Mr. Phelps?

A. No, sir; in the first instance, 4 years, 6 years ago, it was in 1876, he proposed to trade me the bonds for a farm, was the first intimation I had of them; we came near trading, there was only a small difference between us.

349 20. When you saw the coupons were due, did you make any inquiry why they were not paid?

A. No; I only consulted attorney.

21. Why they had not been paid?

A. No, sir; I did not.

22. Did not ask him?

A. No, sir; did not ask anything about them.

23. You understood Percival had the bonds for collection?

A. Yes.

24. Understood he had them to bring suit?

A. No, sir.

25. Did he not tell you why they had not been paid?

A. He did not; yes, he told me they were good, and I would make my money out of them.

26. Discredited; what did you understand by that?

A. Having the interest to pass.

27. You understood the authorities of the county of Otoe would not pay them?

A. I did not; I did not make any inquiries; the first thing done was to consult attorneys; we had similar cases to that in Iowa, so that I had made up my mind that they were good, from other cases, and that was the opinion of my attorneys.

28. Did you ever present them to the county down there for payment?

A. I did not.

29. Nor find out anything about them?

A. I did not.

30. You say you bought them in 1880?

A. 1880.

31. Who was it you first had a conversation with about the bonds?

A. Mr. Henry Phelps.

32. You say you never had a conversation with Mr. Percival about the bonds being discredited by the authorities of Otoe county?

A. At that time not about the bonds; Mr. Percival had the bonds for collection, and I talked with him something about that; how good the bonds were, and he told me he considered them perfectly good, and no doubt I could make my money out of them.

33. Did you not ask why he had not collected them?

A. I did not.

350 34. Did he tell you?

A. I said he told me he could collect them?

35. Did you understand how long he had them in his hands for collection?

A. No; I did not.

36. Did not make inquiry?

A. He said that the papers were made out to commence suit when the papers were delivered to me.

37. Did you have a conversation with Stout about the matter?

A. None whatever.

38. With Phelps only, and Percival, besides the attorneys?

A. That is all, sir.

39. Did you understand how long Mr. Percival had had them in his hands for collection?

A. No; I did not; I inferred he had them some time though; but there was no time fixed.

40. Who was this man Phelps you speak of?

A. He was a contractor, I think, on this road; he lives in Massachusetts.

41. Lives there now?

A. I think he does.

42. He had the bonds then?

A. Yes, sir; well, his wife had them.

43. Did you understand it through him the bonds had been placed in Percival's hands for collection?

A. No.

Re-examined by WOOLWORTH:

44. You say you bought $28,500?

A. Yes.

45. Do you include the coupons in that, or do you mean simply the principal sum on the bonds?

A. I mean the principal and interest; I estimated at that time the principal and interest.

46. In 1876, when you negotiated with Phelps for the bonds in the trade for a farm, who at that time was the owner of the bonds?

A. Mr. Phelps was the only man that talked to me at that time; he said he controlled them.

47. Did he own them, or his wife own them?

A. He and his wife went to look at the farm together that they were trading for; I understood from him she was the party who was to have the farm, if we did the trade.

351 48. Did you buy the bonds in '80, all the bonds in '80, that are sued upon here, and coupons?

A. Yes.

49. Do you mean to say at that time the coupons and bonds together amounted to $28,500, or that the bonds amounted to that?

A. The bonds, the principal amounted to $28,500, the amount that is sued on. The bonds and coupons I think amounted to some $70,000 at the time I got them.

50. You say you paid 50 cents?

A. Yes, sir.

51. Did you pay fifty cents on the principal, or 50 per cent. of the bonds and past due coupons?

A. Fifty per cent. and past due coupons up to the date of the purchase.

52. You say the bonds were discredited; what do you mean by saying they were discredited?

A. I don't know what I mean to say, except you know the interest was not paid; and I understand when interest or anything goes past due it is discredited; it is a bank term for any paper not paid when due.

Re-cross-examined by WATSON:

53. Had you been trying to negotiate for these bonds in '76, do I understand?

A. Yes, sir.

54. Then you had heard of them before 1880?

A. Yes, sir.

55. Why did you fail to get them in '75?

A. Because we did not agree upon the price of the farm; there was a few thousand dollars.

56. Who was you negotiating these bonds with?

A. Henry Phelps.

57. The same party?

A. The same party.

58. What did he ask you for the bonds then?

A. He asked me 50 cents.

59. And the only reason you did not take them you did not agree on the farm?

A. We did not agree on the price.

60. Do you understand that in '76 there was any of the coupons that was not paid?

A. I did not.

352 61. Did he ask 60 cents in money for them, or was it in the land trade?

A. That was in the land trade; I had my price fixed on my farm and he had his price fixed on the bonds.

The plaintiff thereupon rested.

The foregoing is all the evidence offered or given by either party in the trial of the cause, and on application of the defendant this bill of exceptions is allowed by me and ordered to be made a part of the record in this case.

Dated June 27th, 1883.

GEO. W. McCRARY, *Judge.*

This bill of exceptions was presented to me to sign about three weeks ago. Think Judge McCrary is the proper one to sign a proposed bill of exceptions.

ELMER S. DUNDY, *Judge.*

Upon the back of said bill of exceptions appear endorsement, in words and figures following, to wit: No. 235 and 309 G. U. S. circuit court, district of Nebraska. John T. Baldwin *vs.* County of Otoe. Bill of exceptions. Filed June 27th, 1883. Elmer D. Frank, clerk.

353 UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

I, Elmer D. Frank, clerk of the circuit court of the United States for the eighth circuit and district of Nebraska, do hereby certify that the foregoing folios from one to — contain true and faithful transcripts of all pleadings and proceedings of record, and on file in my office as said clerk, and the whole thereof, and the endorse-

ments thereon, in the case of John T. Baldwin *vs.* The County of Otoe.

Witness my hand and the seal of said circuit court, at Omaha, this 21st day of December, A. D. 1883.

[SEAL.] ELMER D. FRANK, *Clerk.*

354 Thereupon afterwards, to wit, on the 7th day of June, 1883, a writ of error was allowed and citation issued in said case, of which the following are the original copies:

UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the District of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you, between John T. Baldwin, plaintiff, and The County of Otoe, defendant, a manifest error hath happened, to the great damage of the said county of Otoe, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, shall be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 7th day of June, 1883.

[SEAL.] (Signed) ELMER D. FRANK, *Clerk.*

Allowed by—

(Signed) GEO. W. McCRARY,
Circuit Judge.

Endorsed: No. 235 and 319 G. United States circuit court, district of Nebraska. County of Otoe, plaintiff in error, *vs.* John T. Baldwin, defendant in error. Writ of error. Filed June 7, 1883. Elmer D. Frank, clerk.

355 THE UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

To John T. Baldwin, Greeting:

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein the county of Otoe is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this 7th day of June, 1883.

[SEAL.] (Signed) ELMER D. FRANK, *Clerk.*
By A. L. FRANK, *Deputy.*

(Signed) ELMER S. DUNDY, *Judge.*

Rec'd above this 7th June, 1883.
(Signed) J. M. WOOLWORTH,
Attorney for Baldwin.

Endorsed: No. 235 and 319 G. United States circuit court, district of Nebraska. County of Otoe, plaintiff in error, *vs.* John T. Baldwin, defendant in error. Citation. Filed June 7, 1883. Filed: Elmer D. Frank, clerk. ———, clerk.

356 And also, on said 7th day of June, 1883, a bond was filed in said case, which said bond is in words and figures following, to wit:

In the Supreme Court of the United States.

JOHN T. BALDWIN
vs.
THE COUNTY OF OTOE.

Know all men by these presents, that we, the County of Otoe, as principal, and Levi Kime, as surety, are held and firmly bound unto John T. Baldwin, of Council Bluffs, in the State of Iowa, in the sum of two hundred and fifty dollars, to be paid to the said John T. Baldwin, his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and we and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, dated this 23d day of May, 1883.

Whereas the above-named the County of Otoe, hath prosecuted a writ of error to the Supreme Court of the United States, to
357 reverse the judgment rendered in the above-entitled cause by the circuit court of the United States for the district of Nebraska—

Now, therefore, the condition of this obligation is such, that if the above named, the County of Otoe, shall prosecute its said writ of error to effect, and answer all costs if it shall fail to make good

its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

THE COUNTY OF OTOE,
By WATSON & WODEHOUSE, [L. S.]
Its Attorneys.

LEVI KIME. [L. S]

Approved:
GEO. W. McCRARY, *Judge.*

Upon the back of said bond appear endorsements, which said endorsements are in words and figures following, to wit, No. 235 and 319 G. United States circuit court, district of Nebraska, John T. Baldwin *vs.* The County of Otoe. Bond. Filed June 7th, 1883. Elmer D. Frank, clerk.

358 In the Supreme Court of the United States.

THE COUNTY OF OTOE, Plaintiff in Error,
vs.
JOHN T. BALDWIN, Defendant in Error. } Assignment of Errors.

Of the October term, in the year of our Lord one thousand eight hundred and eighty-three.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said County of Otoe, by O. P. Mason, I. N. Shambaugh and Watson and Wodehouse, its attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. That the court erred in rendering judgment on the coupons in controversy.

2. That the judgment of the circuit judge should have been in favor of plaintiff in error, instead of in favor of the defendant in error.

359 3. That there was no authority, under the laws of the Territory of Nebraska to issue and donate bonds in controversy to the Council Bluffs and St. Joseph Railroad.

4. That there was no power in the commissioners of Otoe county to issue the bonds in controversy, for the following reasons, to wit:

(*a.*) That the election held on March 17th, 1866, was illegal and void, because the laws of the Territory of Nebraska required that at least four weeks' notice should be given before the election; that the order for this election was given on February 24th, 1866, or only twenty-one (21) days before the election.

(*b.*) That the election held on March 17th, 1866, was illegal and void, because the laws of the Territory of Nebraska required that the proposition to be voted on should be published four weeks prior to the election, and that this was not done, as shown by the record.

(*c.*) That the election held on March 17th, 1866, was illegal and void, because the laws of the Territory of Nebraska required

preme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein the county of Otoe is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this 7th day of June, 1883.

[SEAL.] (Signed) ELMER D. FRANK, *Clerk.*
By A. L. FRANK, *Deputy.*

(Signed) ELMER S. DUNDY, *Judge.*

Rec'd above this 7th June, 1883.
(Signed) J. M. WOOLWORTH,
Attorney for Baldwin.

Endorsed: No. 235 and 319 G. United States circuit court, district of Nebraska. County of Otoe, plaintiff in error, *vs.* John T. Baldwin, defendant in error. Citation. Filed June 7, 1883. Filed: Elmer D. Frank, clerk. ———, clerk.

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In the Supreme Court of the United States.

JOHN T. BALDWIN
vs.
THE COUNTY OF OTOE.

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Sealed with our seals, dated this 23d day of May, 1883.

Whereas the above-named the County of Otoe, hath prosecuted a writ of error to the Supreme Court of the United States, to
357 reverse the judgment rendered in the above-entitled cause by the circuit court of the United States for the district of Nebraska—

Now, therefore, the condition of this obligation is such, that if the above named, the County of Otoe, shall prosecute its said writ of error to effect, and answer all costs if it shall fail to make good

its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

THE COUNTY OF OTOE,
By WATSON & WODEHOUSE, [L. S.]
Its Attorneys.

LEVI KIME. [L. S]

Approved:
GEO. W. McCRARY, *Judge.*

Upon the back of said bond appear endorsements, which said endorsements are in words and figures following, to wit, No. 235 and 319 G. United States circuit court, district of Nebraska, John T. Baldwin *vs.* The County of Otoe. Bond. Filed June 7th, 1883. Elmer D. Frank, clerk.

358 In the Supreme Court of the United States.

THE COUNTY OF OTOE, Plaintiff in Error,
vs.
JOHN T. BALDWIN, Defendant in Error. } Assignment of Errors.

Of the October term, in the year of our Lord one thousand eight hundred and eighty-three.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said County of Otoe, by O. P. Mason, I. N. Shambaugh and Watson and Wodehouse, its attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. That the court erred in rendering judgment on the coupons in controversy.

2. That the judgment of the circuit judge should have been in favor of plaintiff in error, instead of in favor of the defendant in error.

359 3. That there was no authority, under the laws of the Territory of Nebraska to issue and donate bonds in controversy to the Council Bluffs and St. Joseph Railroad.

4. That there was no power in the commissioners of Otoe county to issue the bonds in controversy, for the following reasons, to wit:

(*a.*) That the election held on March 17th, 1866, was illegal and void, because the laws of the Territory of Nebraska required that at least four weeks' notice should be given before the election; that the order for this election was given on February 24th, 1866, or only twenty-one (21) days before the election.

(*b.*) That the election held on March 17th, 1866, was illegal and void, because the laws of the Territory of Nebraska required that the proposition to be voted on should be published four weeks prior to the election, and that this was not done, as shown by the record.

(*c.*) That the election held on March 17th, 1866, was illegal and void, because the laws of the Territory of Nebraska required

360 that the proposition submitted to be voted on shoud be accompanied by a proposition to lay a tax to pay the said bonds.

5. That the defendant in error was not a *bona fide* purchaser of the bonds in controversy.

6. That the circuit court should have followed the rule of decision of the supreme court of Nebraska in case of Meadville *vs.* Hamlin, 6 Neb., 227, which held these bonds void for want of power in the commissioners to issue the same, and which declared the act of the Legislature of the State of Nebraska of February 15th, 1869, which attempted to legalize bonds issued, unconstitutional.

And the said County of Otoe prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of said judgment.

O. P. MASON,
I. N. SHAMBAUGH, AND
WATSON & WODEHOUSE,
Att'ys for Plaintiff in Error.

361 Endorsed: In the Supreme Court of the United States. 1883, October term. No. 1015. The County of Otoe, pl'ff in error, *vs.* John T. Baldwin, def't in error. Assignment of errors. O. P. Mason, I. N. Shambaugh, and Watson & Wodehouse, attorneys for plaintiff in error. Filed 3d October, 1883.

362 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between John T. Baldwin, plaintiff, and The County of Otoe, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the

said Supreme Court, the 24th day of December, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
SAM. F. MILLER,
Associate Justice Sup. Court U. S.

363 Know all men by these presents, that I, James M. Woolworth, of Omaha, in the State of Nebraska, am held and firmly bound unto The County of Otoe, in the full and just sum of two hundred and fifty dollars, to be paid to the said The County of Otoe, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this twenty-fourth day of December, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas, lately at a circuit court of the United States, for the district of Nebraska, in a suit pending in said court, between John T. Baldwin, plaintiff, and The County of Otoe, defendant, a judgment was rendered against the said John T. Baldwin, and the said John T. Baldwin having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said County of Otoe, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next.

Now, the condition of the above obligation is such, that if the said John T. Baldwin shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JAMES M. WOOLWORTH. [SEAL.]

Sealed and delivered in presence of—
(Signed) JAS. M. MAHER.

Approved by—
(Signed) SAM. F. MILLER,
Justice Sup. Court, U. S.

364 In the Supreme Court of the United States.

JOHN T. BALDWIN, Plaintiff in Error,
vs.
THE COUNTY OF OTOE.

It is hereby stipulated that this cause be submitted to the consideration and judgment of the Court, along with the case of the County of Otoe, plaintiff in error, *vs.* John T. Baldwin; that the

two cases be so submitted upon the record in the cause entitled at the head of this stipulation; that the clerk cause to be printed the first cause of action, with a statement that all the other causes of action are in the same terms except as to amount and time of maturity of the coupons counted on; that the clerk cause also to be printed the defense of the statute of limitations to one cause of action, with a statement that the same defense is in the same terms pleaded to the other causes of action upon coupons which were more than five years past due when the actions were commenced in the cir-
365 cuit court. All allegations in the pleadings common to all the causes of action, and to all the defenses, and all other parts of the record, are to be printed. This stipulation is also to be printed in the record, the object of the same being to save expense and for the convenience of the Court.

J. M. WOOLWORTH,
Attorney and of Counsel for John T. Baldwin.
J. C. WATSON,
One of the Attorneys for Otoe County, and of Counsel.

Dated Washington, Dec. 24, 1883.

Endorsed on cover: Nebraska C. C. U. S. No. 1015. The County of Otoe, plaintiff in error, *vs.* John T. Baldwin. Filed October 3, 1883. No. 1235. John T. Baldwin, plaintiff in error, *vs.* The County of Otoe. Filed December 26, 1883.

111-1

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

Nos. 1015 and 1235.

THE COUNTY OF OTOE, PLAINTIFF IN ERROR,

vs.

JOHN T. BALDWIN.

AND

JOHN T. BALDWIN, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF OTOE.

STIPULATION OF COUNSEL AND ADDITION TO RECORD.

Filed February 23, 1884.

In the Supreme Court of the United States.

THE COUNTY OF OTOE, ETC., *vs.* JOHN T. BALDWIN.

Stipulation.

It is hereby stipulated and agreed by and between the parties above named that the act of the Territorial Legislature of Nebraska, hereto annexed, and which is the same act that was referred to as Exhibit "D" in the certificate of division of the judges in said cause, and which said exhibit was omitted by the clerk of the circuit court in certifying up the record in said cause, be printed by the clerk of the Supreme Court, and be made a part of the transcript of the record in said cause.

O. P. MASON,
J. N. SHAMBAUGH, AND
WATSON & WODEHOUSE,
Attorneys for Otoe County.
J. M. WOOLWORTH,
Attorney for John T. Baldwin.

EXHIBIT "D."

An act to authorize the county commissioners of Otoe county to issue the bonds of said county to the amount of one hundred and fifty thousand dollars to the Burlington and Missouri River Railroad, or any other railroad running east from Nebraska City.

Whereas the qualified voters of the county of Otoe and State of Nebraska have heretofore, at an election held for that purpose, au-

thorized the county commissioners of said county to issue the bonds of said county in payment of stock to any railroad in Fremont county, Iowa, that would secure to Nebraska City an eastern railroad connection to the amount of two hundred thousand dollars, and whereas but forty thousand dollars have been issued—

SECTION 1. *Therefore, be it enacted by the Legislature of the State of Nebraska*, That said commissioners be, and they are hereby, authorized to issue one hundred and fifty thousand dollars of the bonds aforesaid to the Burlington and Missouri River Railroad Company, or any other railroad company that will secure to Nebraska City a direct eastern railroad connection, as a donation to said railroad company, on such terms and conditions as may be imposed by said county commissioners.

SEC. 2. Said bonds, when so issued, are hereby declared to be binding obligations on said county, and to be governed by the terms and conditions of an act entitled "An act to enable counties, cities, and precincts to borrow money or to issue bonds to aid in the construction or completion of works of internal improvement in this State, and to legalize bonds already issued for such purposes," approved February, A. D. 1869.

SEC. 3. This act to take effect and be in force from and after its passage.

Approved February 15th, 1869.

UNITED STATES OF AMERICA, }
District of Nebraska, } ss:

I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, certify that I have compared the annexed copy of Exhibit "D," referred to in the certificate of division of opinion of the judges in the case of John T. Baldwin *vs.* The County of Otoe, with the original on file in this office, and the same is a correct transcript thereof, and of the whole of said original.

In testimony whereof, I have caused the seal of said court to be hereto affixed, at the city of Omaha, in said district, this 16th day of February, 1884.

[SEAL.] ELMER D. FRANK, *Clerk.*

Endorsed: Supreme Court U. S. 1883. October term. No. 1015 and 1235. The County of Otoe, pl'ff in error, *vs.* John T. Baldwin and John T. Baldwin. Stipulation of counsel and addition to record. Office Supreme Court U. S. Filed February 23, 1884. James H. McKenney, clerk.

111-1

RECEIVED
DEC 28 1893
JAMES H. McKENNEY
CLERK

IN THE UNITED STATES SUPREME COURT.

JOHN T. BALDWIN,
Plaintiff in Error,
vs.
THE COUNTY OF OTOE.

THE COUNTY OF OTOE,
Plaintiff in Error,
vs.
JOHN T. BALDWIN.

BRIEF AND ARGUMENT FOR JOHN T. BALDWIN.

J. M. WOOLWORTH,
Of Counsel for Plaintiff.

F. C. FESTNER PRINTER OMAHA, NEB

IN THE UNITED STATES SUPREME COURT.

JOHN T. BALDWIN,
Plaintiff in Error.
vs.
THE COUNTY OF OTOE.

THE COUNTY OF OTOE,
Plaintiff in Error.
vs.
JOHN T. BALDWIN.

BRIEF AND ARGUMENT FOR JOHN T. BALDWIN.

These are writs of error to the Circuit Court of the United States for the District of Nebraska.

The actions, originally two but consolidated by order of the court and tried as one cause, were brought by Baldwin upon coupons detached from bonds issued by the defendant county.

The bonds were all alike in their terms, except in respect of the amount, some being for $500, and some for $100. They were, with that exception, of the following form:

"KNOW ALL MEN BY THESE PRESENTS, That the "County of Otoe, in the Territory of Nebraska, acknowl- "edges itself indebted and bound to the Council Bluffs "& St. Joseph Railroad Company in the sum of Five "Hundred Dollars, lawful money of the United States of "America, to be paid to the said Council Bluffs & St. "Joseph Railroad Company, or their assigns, at the office "of the County Treasurer of said county, on the First day "of January, in the year one thousand eight hundred and "eighty seven, with interest thereon from the first day of "January next after the date thereof, at the rate of ten "per cent. per annum, payable semi-annually, at the office "of the County Treasurer of said county, on the first days "of July and January in each year, on the presentation "and surrender, as they fall due, of the annexed coupons "or interest warrants, the first payments of interest to be "made on the first day of July next ensuing the date of "these presents.

"This bond is one of a series of one hundred and "sixty, of the like tenor and date, one hundred of which "are each for one hundred dollars, in the aggregate "amounting to the sum of forty thousand dollars, executed "and issued, or to be issued from time to time as the wants "of said county shall require, to pay to the Council "Bluffs & St. Joseph Railroad Company as an appropria- "tion made by said county to said railroad company, to "aid in the construction of the railroad of said company, "to be located in Fremont County, through a point most "convenient to Nebraska City.

"This debt is authorized by a vote of the legal voters "of said county of Otoe, taken at an election duly held "under and by virtue of an order of the County Commis- "sioners of said county, on the 17th day of March, 1866, "in pursuance with the several acts of the Legislature of "the Territory of Nebraska, in such cases made and pro- "vided, and a resolution of the County Commissioners of "said county granting such aid.

"IN WITNESS WHEREOF, the said County of Otoe has "caused this bond to be signed in its behalf by the Chair- "man of the Board of County Commissioners, and the "Treasurer, attested by the County Clerk and seal of said "county, affixed at the office of the County Clerk, in "Nebraska City, Nebraska Territory, the 12th day of No- "vember, in the year of our Lord one thousand eight "hundred and sixty-six.

"Register No.....

MILLS S. REEVES,
Treasurer.

D. M. MARTIN,
"Ch'n Board of Co. Com'rs."

Attest:

ELISHA BENNETT, County Clerk.

SEAL

The defenses pleaded in the answer were, first, the statute of limitations to the coupons which were more than five years past due when the suit was brought.

"This debt is authorized by a vote of the legal voters "of said county of Otoe, taken at an election duly held "under and by virtue of an order of the County Commis- "sioners of said county, on the 17th day of March, 1866, "in pursuance with the several acts of the Legislature of "the Territory of Nebraska, in such cases made and pro- "vided, and a resolution of the County Commissioners of "said county granting such aid.

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Mills S. Reeves,
Treasurer.
D. M. Martin,
"Ch'n Board of Co. Com'rs."

Attest:

Elisha Bennett, County Clerk.

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filed, and the cause came on to be tried before the Judges.

On the trial the plaintiff below produced the bonds and coupons sued upon, and rested. The defendant then produced a certified copy of certain records of the County Commissioners, and proved by the County Clerk that these records were all that appeared upon the books of the Commissioners, and there rested.

The plaintiff, Baldwin, afterwards testified to all the facts necessary to establish his character as a *bona fide* purchaser of the bonds for a valuable consideration, without notice.

Upon the case thus made the cause was submitted to the consideration and determination of the court. The Judges being of opinion that the plea of the statute was good, refused to give judgment for the coupons which were more than five years past due when the action was brought, but rendered judgment for what was due upon all the others: the amount being $19,537.65.

Both parties being dissatisfied, each prosecutes a writ of error for the review of the judgment.

ASSIGNMENT OF ERROR.

The plaintiff Baldwin complains of the said judgment, and alleges that the same is erroneous because the Court sustained the plea of the statute of limitations to the several causes of action numbered from one to four hundred and forty inclusive, and refused to allow him the amount of coupons therein pleaded in the assessment of damages and to render judgment therefor.

The second defense was—

That the County Commissioners issued the bonds without authority of law; that they issued the same to the Council Bluffs & St. Joseph Railroad Company, which was a corporation organized under the State of Iowa, and owned and operated no railroad within the State of Nebraska, and were given by the County Commissioners to that company to aid the construction of a railroad, no part of which was within the latter state.

The third defense was—

That the bonds were without authority of law, because the question of their issue was never submitted to the people or voters of the county, either at a regular or special election, and that no proposition to lay or levy a tax for the payment of the bonds, or coupons, was ever submitted to them, and that the bonds and coupons were a mere donation to the railroad company.

The fourth defense was—

That the bonds were obtained from the county by fraud; which fraud is alleged to have consisted in an agreement on the part of the railroad company to build its road through Fremont county, in the State of Iowa, through a point most convenient to Nebraska City, in the County of Otoe, and through the nearest practicable point on the Missouri River, opposite that place, not more than sixty rods from the river, and establish a depot at that place, and that it did not do so.

Replies deny these allegations in the answers were

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Replies deny these allegations in the answers were

ant seeks to escape liability, and the case here is the same. Not until 1885, when the bonds came to Baldwin's hands, was there a right of action in any one not expressly protected from the operation of the provision of limitation.

We submit therefore that the pleas to 440 causes of action were not good and ought to have been overruled, and the amount of the judgment should have included what was due thereon.

The judgment should, therefore, be reversed, with directions to enter judgment for the whole amount to be found due upon all of the coupons counted on by the plaintiff in his petition.

SECOND POINT.

THE PLAINTIFF IS A BONA FIDE HOLDER FOR VALUE.

The court below found that Baldwin was a *bona fide* holder of the bonds and coupons sued on. But for this finding, judgment must have been for the defendant, unless the bonds were good in first hands. This court will not go back of the finding.

But were it to do so, the result would be the same. The defendant adduced no evidence whatever upon the question. Baldwin testified that he gave fifty per cent. of what was due upon the bonds and coupons. Upon cross examination he testified, that he did not understand that there was any defense to the bonds; that he understood they were "discredited," which he afterwards explains by saying that by that expression he means that the interest was not paid. He says, "I understand when

FIRST POINT.

THE STATUTE OF LIMITATIONS.

The plaintiff admits that in the first 440 causes of action pleaded by him he counted on coupons which were more than five years past due when the suit was commenced, and he further admits that under ordinary circumstances the plea of the statute would be good.

But it is alleged in the petition that the plaintiff purchased the bonds from a married woman who held them from a time not more than six months after their date until she sold and transferred to Baldwin, and it appears from his deposition that he bought them in 1880. If the period of time during which Mrs. Phelps owned the bonds be not counted then five years did not elapse after the right of action accrued and before the action was brought.

Section 17 of the Code of Civil Proceedure of Nebraska is as follows:—

"If a person entitled to bring any action mentioned in this title, except for a penalty or forfeiture, be at the time the cause of action accrued within the age of twenty-one years, a married woman, insane, or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this title after such disability shall be removed."

Had Mrs. Phelps, who held these bonds for many years while she was married, been widowed the statute of limitations would not have begun to run until that event. So says the very statute under which the defend-

THIRD POINT.

LEGAL AUTHORITY TO ISSUE THE BONDS.

At the time the bonds were made, that is to say, in 1866, there was clear authority of law for their issue. There were two statutes in force at the time, either of which was enough for the purpose.

Authority to issue bonds was conferred upon the County Commissioners by an act of the legislature of the Territory of Nebraska, which was as follows:

"An act, to authorize Otoe County to subscribe and "take stock in any railroad located or to be located in "Fremont County, in the State of Iowa.

"Section 1. Be it enacted by the Council and House "of Representatives of the Territory of Nebraska, that "the Board of County Commissioners of Otoe County, "may at any time by an order of said Board cause an "election to be held for the purpose of ascertaining the "will of the people of Otoe County, as to the propriety of "said County subscribing stock for any amount not ex- "ceeding seventy-five thousand dollars to any railroad "company, for the purpose of constructing any railroad "now or hereafter to be located in Fremont County and "State of Iowa.

"Sec. 2. If a majority of legal voters of said "County shall vote in favor of such proposition, then the "Board of County Commissioners of Otoe County shall "issue the bonds of said County for whatever amount of "stock it may have been decided upon by such vote, to

interest or anything goes past due it is discredited. It is a bank term for any paper not paid when due."

A rigid cross examination failed to show any fact which went to the character of the plaintiff as a *bona fide* holder of the paper, for value, without notice of any defects in the bonds.

Besides, the bonds contained recitals which justified a party proposing to purchase in treating them as valid.

"This bond is one of a series of one hundred and sixty, of the like tenor and date, one hundred of which are each for one hundred dollars, and sixty of which are each for five hundred dollars, in the aggregate amounting to the sum of forty thousand dollars, executed and issued, or to be issued from time to time as the wants of said county shall require to pay to the Council Bluffs and St. Joseph Railroad Company as an appropriation made by said county to said railroad company to aid in the construction of the railroad of said company, to be located in Fremont county, through a point most convenient to Nebraska City.

"This debt is authorized by a vote of the legal voters of said county of Otoe, taken at an election duly held under and by virtue of an order of the county commissioners of said county, on the 17th day of March, 1866, in pursuance with the several acts of the legislature of the Territory of Nebraska in such cases made and provided, and a resolution of the Board of County Commissioners of said county granting such aid."

and of the United States might be cited, in which this principle has been enunciated and enforced; but it would serve no good purpose to mention them. The doctrine was reiterated in the *Railroad Company vs. This defendant*, 16 Wall., 667, a case nearly allied to the one at bar.

The most recent case is *Taylor vs. Ypsilanti*, 4 Morr., Tran. 326. In fact, it is not clear from its brief that the defendant denies the doctrine, but only that a territorial legislature cannot confer this power upon a county.

That question was set at rest in *Rogers vs. Burlington*, 3 Wall. 654. Mr. Justice Clifford delivering the opinion of the Court, says, at page 662, that "Charter of defendants was granted on the tenth day of June, 1845, by the territorial legislature acting under its organic act," in which (5 U. S. St. at Large 235, Sec. 6) the legislative power is granted in the identical terms of the act organizing Nebraska; and he proceeds to say, "there can be no question that the territorial legislature acting under that general delegation of legislative power had authority to incorporate the defendants, and confer upon them as such corporation the functions specified in their charter," among which was the power to borrow money for any public purpose, whenever in the opinion of the city council it should be deemed expedient to exercise that power.

The further objection on constitutional grounds is, that the legislation by which these bonds were authorized, was by an act specially relating to the defendant, and is forbidden by the clause of the constitution, which inhibits the grant of corporate power by special acts, is met by

"any such railroad company, which bonds shall not bear "any greater interest than ten per cent. per annum.

"Sec. 3. This act shall take effect and be in force "from and after its passage.

"Approved January 6th, 1860."

We proceed to examine the objections to this statute.

It is said, in the first place, that it was passed by the legislature of a Territory. This is true, but the objection is without force.

It was competent for the legislature of the Territory of Nebraska to enact laws authorizing the authorities of counties generally, or of Otoe county particularly, to issue bonds to aid the construction of railroads.

The provision of the act of congress organizing the Territory is correctly quoted by the learned counsel for the defendant, at page 12 of their brief, as follows:

"The legislative power of the territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act."

The organic act contained no limitations upon the plenary power thus granted to the legislature, such as are now common in constitutions of the states.

At this day the principle must be considered as settled in the Federal Courts that counties may be authorized by legislation to aid the construction of railroads and issue bonds therefor, except so far as such legislation is prohibited or restrained by constitutional provisions. A great multitude of cases in the Courts of the several States

On the 11th of January, 1861, an act was passed entitled, "An Act to define the power and duties of County Commissioners and County Clerk." This act, amended in some of its provisions, but not in any particular material here to notice, will be found in the General Statutes of 1873, at page 232, *et pass.* The 24th section of the original act, and the 16th section as it appears in the General Statutes at page 235, is in its purport and effect the same as the provision on which the bonds in *Rogers vs. Burlington*, 3 Wall., 654, were issued. We set them out in parallel columns, in order that their similarity may appear at a glance.

THE NEBRASKA STATUTE OF 1861.	THE STATUTE OF IOWA.
The said commissioners shall have power to submit to the people of the county at any regular or special election the question whether the county will borrow money to aid in the construction of public buildings, the question whether the county will aid or construct any road or bridge, or to submit to the people of the county any question involving an extraordinary outlay of money; and said commissioners may aid any enterprise designed for the benefit of the county as aforesaid, whenever a majority of the people thereof shall be in favor of the proposition, as provided in this section.	Whenever in the opinion of the city council it is expedient to borrow money for any public purpose, the question shall be submitted to the citizens of Burlington; the nature and object of the loan shall be stated, and a day fixed for the electors of the city to express their wishes. The like notice shall be given as in cases of an election. The loan shall not be made unless two thirds of all the votes polled at such election shall be given in the affirmative.

In the case cited, the power to borrow money for the

the simple fact that these bonds were issued in 1866, as appeared by their date, while the State was not admitted into the Union until 1867. Limitations in its first constitution, which was not adopted until that year, could not invalidate legislation of the territory and acts thereunder. This disposes of the constitutional objections to the bond.

But it is said that the act cited authorized the issue of bonds for the payment of a subscription of the county to the stock of the railroad company, while the vote taken was for a donation of bonds, and that the act authorized the issue of bonds to the amount of $75,000 only, while the vote was for $200,000.

But it is very certain that if the statute had been followed and a subscription had been made, and the bonds had been applied to the payment thereof, and the vote had been upon a proposition to issue only $75,000, the law would have authorized the issue.

It thus appears that there was authority to issue the bonds under certain circumstances.

But it is further said that the road to be aided was entirely without the limits of the territory of Nebraska, and that it was not competent for the Legislature to authorize bonds in aid of such an enterprise.

That question was raised in the case of the *Railroad Company vs. The County of Otoe*, 16 Wall., 270, and was ruled in favor of the validity of the bonds.

But there was another statute authorizing the issue of bonds.

Section 29 of the act is as follows: "The said commissioners, being satisfied that the above requirements (that is about laying the tax) have been complied with, and that a majority of the votes cast are in favor of the proposition submitted, shall cause the same to be entered at large on the book containing the record of their proceedings, and they shall then have power to levy and collect the special tax in the same manner that other county taxes are levied. Propositions thus acted upon cannot be rescinded by the board of county commissioners."

This section requires the commissioners to enter upon their record not all of their proceedings in detail, but only that they are satisfied that they are conformable to law, and that a majority of the votes cast are in favor of the proposition.

That being the full extent of the record which is required, let us look into the paper produced by the defendant and see what it contains. It shows an abstract of the votes as canvassed by the proper officers, from which it appears 1362 votes were cast in favor of and 201 against the proposition. Then in the order donating these bonds to the railroad company, it is stated that it was in conformity with the vote taken "in pursuance of the several acts of the legislature in such case made and provided."

This statement so entered meets all the requirements of the statute and raises a presumption conclusive upon the defendants, that the commissioners were satisfied upon the two points:

and the whole regulation, including the time of its taking effect, or having operation, if it be of a nature to be set forth, and the penalty of its violation, if there be one, is to be published at least for four weeks in some newspaper published in the county. If there be no such newspaper the publication is to be made by being posted up in at least one of the most public places in each election precinct in the county, and in all cases the notices shall name the time when such question will be voted upon, and the form in which the question shall be taken, and a copy of the question submitted shall be posted up at each place of voting during the day of election.

It is claimed that notice was not published four weeks. Let it be admitted. It is also claimed that the proposition to levy a tax, etc., was not presented to the voters. Let that be admitted.

And yet we have in the recital in the bonds, the positive statement that the debt was duly authorized by a vote taken at an election duly held in pursuance of law. The county cannot now be held to deny that statement.

If the recital be strictly construed according to a late judgment of this court, it covers every objection which is taken to the election: it says that that election was duly held in pursuance of the statute.

As no objections are made here to any of the proceedings on which the bonds were issued, except those going to the regularity and validity of the election, it results that they must be treated as valid for all purposes.

But we do not need to rest our argument upon general principles. The record of the proceedings, imperfect as it is, is a complete answer to the objection of the defendants: for it contains all that the statute requires.

Bissell vs. Jeffersonville, 24 How. 287.
Van Hosprop vs. Madison, 1 Wall. 291.
Mercer County vs. Hackett, Ib. 83.
St. Joseph vs. Rogers, 16 Wall. 644,
Rock Creek vs. Strong, 96 U. S. 27.
Marcy vs. Oswego, 92 Ib. 637.
San Antonio vs. Mehaffy, 96 Ib. 312.
Commissioners vs. Bolles, 104 Ib. 107.

And several of the cases cited *supra*.

The case of *Anthony vs. The County of Jasper*, 100 U. S. 693, cited by our adversaries, is not in point. The question there was, whether the bonds had been duly executed,—not whether there was power under any circumstances to issue them, not whether having been duly executed they would be valid in the hands of a *bona fide* holder.

FIFTH POINT.

THE BONDS IF INVALID AT THEIR ISSUE HAVE BEEN VALIDATED BY SUBSEQUENT LEGISLATION.

Besides the grounds above stated, upon each of which the validity of the bonds in question must be sustained, there is another which is equally decisive. It is that, even if obnoxious to the objections which are here made to them when they were originally issued, the defects have been cured by the subsequent legislation contained in the eighth section of the general improvement act of 1869. That section is set out at page eight of the defendant's brief.

1. That the majority of the votes cast was favorable to the proposition; and,

2. That the requirement about submitting the proposition to lay a tax had been complied with.

We admit that the record is very inartificial and meagre, but it is sufficient. It is in the terms of recitals in bonds which have been held to estop counties to deny the regularity of proceedings on which they were issued, as will be readily seen by looking at the following cases:

Town of Colomo vs. Eanes, 92 U. S., 484.
Town of Venice vs. Murdock, Ib. 494.
Converse vs. Fort Scott, Ib. 504.
Marcy vs. Oswego, Ib. 638.
Commissioners vs. Bolles, 94 Ib. 104.
Commissioners vs. January, Ib. 204.
Buchanan vs. Litchfield, 102 Ib. 278.

If sufficient for such purpose, the terms of this record are certainly sufficient to show that the commissioners were satisfied that the statute had been complied with, and to raise the presumption which the defendant was bound by other testimony to overcome.

This disposes of the whole case, and renders it unnecessary to examine other matters urged by the defendant's counsel in their elaborate brief.

The defects alleged, even if they were shown in evidence, have been the subject of examination in a series of cases, begining with *Knox County vs. Aspinwall*, 21 How, 539, and coming down to some of the very latest judgments of the Court. Some of them are:

the first time, but they will cause the Court to hesitate before sustaining the objection.

In *San Antonio vs. Mehaffy*, 96 U. S. 312, the act under examination was entitled "An act to incorporate and San Antonio Railroad Company." Its twelfth section authorized the city to issue the bonds on which the action was brought. It was contended that the issue of bonds was foreign to the subject of the incorporation; but the objection was held untenable: the aid to the construction of the road of the company incorporated by the act being in furtherance of its object, was considered to be within the scope of the title.

There are many other similar cases, among which may be mentioned.

Supervisors vs. The People, 25 Ill. 181.
Firemen's Association vs. Lounsbury, 21 Ill. 511.
Robinson vs. Skepworth, 23 Ind. 311.
Cooley on Constitutional Limitations, 146.

And cases cited.

No objection can be made to the act on account of the insufficiency of the title, for it includes the matter of the eighth section. It purports to be an act not only providing for the issue of bonds, but to legalize those already issued. The real objection, if there be any, is that the title describes only bonds issued for the purpose of aiding works of internal improvement *in this State*, and it is claimed that these words do not cover bonds issued to aid the construction of a railroad out of the State.

It must be observed that if this objection is good as

The terms of the section are broad enough and explicit enough to cover these bonds. It is not contended that they are not so. Other reasons exterior to the section are urged against the validity of the provision which we proceed to examine.

1. The first objection is that the act containing this section is unconstitutional, because, in violation of section 19 of article II. of the constitution, it contains more than one subject, and its subject matter is not clearly stated in the title.

If this objection be good, the consequences are serious. It goes to the whole act and invalidity, not only the eighth section, but every other of its provisions. That is a general law which has remained on the statute book from its passage in 1869 until now. It has not been materially amended, replaced or supplemented by any subsequent act. It has stood alone, and now stands alone, as the one source of authority for the action of counties, cities and precincts in the issue of bonds. Millions of these securities have been put upon the market and sold solely by virtue of the power supposed to be conferred by it. If this objection be good here, all of them are void for want of the power which this statute affects to confer.

During all the long time it has stood upon the statute book, this Court and the State Courts have been full of cases upon bonds issued under it, and the suggestion was never made that it was unconstitutional. These considerations may not be decisive of the question now raised for

SIXTH POINT.

THE STATE DECISION.

It is further insisted that the Supreme Court of the State of Nebraska in the case of *Hamlin vs. Meadville*, 9 Neb. 227, has decided that these bonds are void for want of authority in the county authorities to issue them, and that this Court is bound to follow that decision. To that proposition there are two decisive answers.

1. That was an action to enjoin the collection of taxes levied for the payment of these bonds brought by the plaintiff as a taxpayer against the treasurer of the county.

Mr. Baldwin, the plaintiff here, was not a party to that suit, nor was any person under whom he claims, nor for that matter any other person holding the bonds. Nor is the judgment pleaded by the defendant, nor was it offered in evidence on the trial. It cannot be insisted upon here as an estoppel. The most that can be claimed for it is that it is a decision of the Supreme Court of the State, and, as such, is authority here for the defendant.

In that case the Court was not called upon to say, nor did it say, what the right of the matter was as between a *bona fide* holder of the bonds, which we have seen that Mr. Baldwin is, on the one side, and the county on the other side. The Court simply held that in that action between the tax payer and the tax collector, it was not shown that the question of taxation was submitted to the voters, and therefore, that is to say in that action, the proceedings

to the eighth section, it is good as to the whole act. The title is "to aid in the construction or completion of works of internal *improvement in this State*." The first section is general in its terms and authorizes the granting of aid to railroads, as well out side of the State as within it. If the eighth section is bad, the whole act is bad, and there is not a bond which has been issued in this State since February 15, 1869, which is valid.

Besides these two objections to the efficiency of the section to validate these bonds, it seems to be urged in a general way that the original defect in them was of so radical nature, that it was beyond the competency of the legislature to purge them of vice. It has already appeared that the defect alleged in these bonds is that the proposition to lay a tax was not included in the question submitted to the voters. We do not think that fact has been shown, but for the purpose of the argument let it be conceded. We submit that it was not of so radical a nature as to be beyond the curative efficiency of a subsequent statute. That very defect existed in the bonds in the case of *Ritchie vs. Franklin County*, 22 Wall, 67, and was held not to be beyond cure. To the same effect are:

Thompson vs. Lee County, 3 Wall, 67.
St. Joseph Township v. Rogers, 16 Ib. 644, 66.
Campbell vs. Kenosha, 5 Ib. 194.
Thompson vs. Perrine, 103 U. S. 806.
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not concluded by these decisions, and rendered judgment for the holder of the bonds. Mr. Justice Strong speaks on this point at page 501. He having produced the bonds at the trial, it rested on the defendant to show some fact impeaching his character as a *bona fide* holder of them. There was no attempt to do so. The case was left unimbarrassed by any proof on the subject.

J. M. WOOLWORTH,

Of Counsel for Plaintiff.

were entirely void. That is the extent of the decision. It remains an open question in the Supreme Court whether a *bona fide* holder of the bonds could recover against the county in an action upon the bonds.

That is one decisive answer to the proposition: but there is another.

2. This Court is not concluded upon this question by the decision cited.

This identical question was passed on by the Supreme Court in *The Town of Venice vs. Murdock*, 92 U. S. 494-501. That was an action upon bonds issued by the town under the statute of New York, which empowered the supervisor and two assessors who were thereby appointed to act with him as commissioners, to borrow $25,000 to aid in the construction of the railroad and execute the bonds of the town therefor. It is expressly provided, that these officers should have no authority to issue the bonds until the written consent of two-thirds of the resident tax payers appearing on the assessment rolls should have been obtained and filed with the county clerk, and the affidavit of these officers was also filed that the assents were of the requisite number of tax payers. All which was done.

The Court of Appeals in several cases arising on the same statute, and a similar state of facts, held that it was competent to go behind the recitals in the bonds, the affidavits filed and the decisions of the officers, and it appearing that the requisite assent was not had, it held the bonds void. The United States Supreme Court held that it was

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J. M. WOOLWORTH,

Of Counsel for Plaintiff.

AN ACT

To define the powers and duties of County Commissioners and County Clerks.

SEC. 1. *Be it enacted by the Council and House of Representatives of the Territory of Nebraska*, That there shall be a board of county commissioners, consisting of three persons in each organized county in this territory. Said commissioners shall have the qualifications of electors, and shall be elected by the qualified voters of the several counties respectively at the annual general election; and when a vacancy occurs in the office of county commissioner, sixty days or more before the expiration of his term of office as hereinafter provided, the vacancy shall be filled by a special election.

§ 2. Each county shall be divided into three districts by the first board of county commissioners elected under the provisions of this act, which districts may be numbered from one to three; and said districts shall not be changed oftener than once in three years by said board. The board of commissioners, at their first session after their election under this act, shall proceed to divide their respective counties into districts as provided in the first part of this section, and one commissioner shall be elected from one of said districts at each general election thereafter, by the qualified voters of the whole county: Provided that it shall not be lawful to change said district lines without a full board of commissioners existing at the time said lines are changed.

§ 3. At the first election held to choose the board of commissioners under this act for any county, the person at the first election having the highest number of votes shall continue in

office for three years, the next highest three years, and the next highest one year; but if any two or more persons have the same number of votes, their term of office shall be determined by the board of canvassers, and each commissioner elected at the first general election in pursuance of this act, shall hold his office for three, two and one years, as the case may be, and until his successor shall be duly elected and qualified, and each commissioner elected thereafter in pursuance of the second section of this act shall hold his office for three years, and until his successor shall be elected and qualified.

§ 4. Each person elected county commissioner, shall, on receiving a certificate of his election, take an oath before some officer qualified to administer oaths, that he will support the constitution of the United States and the organic act of this territory, and perform faithfully all the duties enjoined by this act, which oath shall be certified to by the officer administering the same, under seal, and filed in the office of register of deeds for said county for record in a book kept for that purpose, and when so recorded shall be sufficient authority for such commissioners to act.

§ 5. The county commissioners shall meet and hold sessions for the transaction of county business at the court house in their respective counties, or at the usual place of holding courts, on the first Monday in January, April, July and October of each year, and may adjourn from time to time for the transaction of busines; and the county clerk shall have the power to call special sessions when the interest of the county demands it, upon giving five days' notice of the time and object of calling the commissioners together, by posting up notice in three public places in the county, or by publication in one newspaper in the county.

§ 6. The county clerk shall attend the sessions of said commissioners, and keep a true and full record of all their proceedings in a book to be provided for that purpose, and the sheriff of the county shall also, by himself or deputy, attend their sessions and execute their orders.

§ 7. When two only of the commissioners of the board shall attend, and shall be divided on any question, they shall defer a decision until the next meeting of the board, and then the matter shall be decided by a majority of the board.

§ 8. Copies of their proceedings, duly certified and attested by the county clerk under seal, shall be received as evidence in all courts in this territory.

§ 9. Any of said commissioners or the county clerk, shall have power and authority to administer oaths or affirmations in all cases, and said commissioners shall have power to preserve order when sitting as a board, and may punish contempts by fine not exceeding five dollars, or by imprisonment in the county jail not exceeding twenty-four hours—they may force obedience to all orders made by them, by attachment or other compulsory process, and when fines are assessed by them the same may be collected before any justice of the peace having jurisdiction, and shall be paid over as other fines, within ten days after they are collected.

§ 10. It shall be the duty of the county commissioners to allow and caused to be audited by their clerk, all claims against the county, and the oldest commissioner shall draw all warrants on the treasurer for money to be paid out of the county treasury, which warrant shall be countersigned by the county clerk and sealed with the county seal. It shall be their duty to settle with the county treasurer, or with any and all persons who have received moneys belonging to the county or to the common school fund of the county, and to cause their accounts to be audited by the county clerk. They shall have power to issue a citation to any county officer who is charged with malfeasance, or nonfeasance or misfeasance to show cause why he should not be removed from office, and to remove from office all county officers who shall be found by them, guilty of corruption, extortion, bribery or willful neglect of duty.

§ 11. The said commissioners shall keep a distinct account with the treasurer of the county for each several terms for which the treasurer may be elected, in a book to be provided for

that purpose, commencing from the day on which the treasurer became qualified, and continuing until the same, or another person is qualified as treasurer, in which account they shall charge the treasurer with all sums paid him, and for all sums for which the said treasurer is accountable to the county, and they shall credit him with all orders returned and canceled, with all moneys paid and with all vouchers presented by him and with all matters with which the treasurer is to be credited in account, and the said commissioners shall in their settlement with the treasurer keep the general, special and road tax separate, that any citizen of the county may see how the same has been expended.

§ 12. They shall keep a book in which all orders and decisions made by them shall be recorded, except those relating to roads and bridges, and all orders for the allowance of money from the county treasury shall state on what account and to whom the allowance is made, dating the same and numbering them consecutively as allowed from the first day of January to the thirty-first day of December each year.

§ 13. They shall keep a book for the entry of all proceedings and adjudications relating to the establishment, change or discontinuance of roads.

§ 14. They shall keep a book for the entry of warrants on the county treasurer, showing number, date, amount and name of the drawee of each warrant drawn on the treasury, which may be known as the warrant book; and the warrants shall be numbered in relation to the order and decision allowing the amount for which the same is drawn.

§ 15. They shall have power to institute and prosecute civil actions in the name of the county for and on behalf of the county.

§ 16. Said commissioners shall have the power to make all orders respecting the property of the county, to sell the public grounds of the county and to purchase other grounds in lieu thereof; and for the purpose of carrying out the provisions of this section, it shall be sufficient to convey all the interest of

the county in such grounds, when an order is made for the sale and a deed is executed in the name of the county, by the eldest commissioner, reciting the order, and signed and acknowledged by him for and on behalf of the county before some officer authorized to take acknowledgment of deeds: Provided, however, that the question of the sale of such public grounds or lands shall be first submitted to a vote of the people of the county as hereinafter provided, and sanctioned by a majority vote thereof.

Second—They shall have power to levy a tax not exceeding the amount now authorized by law to defray county expenses, and to liquidate county indebtedness.

Third—To audit the accounts of all officers having the care, management, collection or disbursement of any money belonging to the county or appropriated for its benefit.

§ 17. Said commissioners shall superintend the fiscal concerns of the county, and secure their management in the best manner. They shall keep an account of the receipts and expenditures of the county, and on the first Monday of July, annually, they shall cause a full and accurate statement of the assessments, receipts and expenditures of the preceding year to be made out in detail under separate heads with an account of all debts payable to and by the county treasurer, and they shall have the same printed in at least one newspaper in their county, and if there be no paper in the county, the same shall be posted up at the usual place of holding their sessions, and at one public place in each precinct of the county.

§ 18. The said commissioners are authorized to procure for their county, a copy of the field notes, as soon as practicable, of the original survey of their county by the United States, and cause a map of the county to be constructed therewith on a scale of not less than one inch to a mile, and laid off into congressional townships and sections, to be kept open in the office of the county clerk, and the field notes to be deposited in the same office.

§ 19. The county commissioners in each organized county in this territory, shall procure or cause to be procured, a book,

which shall be called an "entry book," and said county commissioners shall direct their clerk to obtain and record in said entry book, a list of each tract of land situated in their respective counties, beginning with section No. 1, and numbering up to section No. 36, in each congressional township, which list shall state the names of the persons who may have entered the land, and the date of the purchase from the United States.

§ 20. All pieces or parcels of land not sold by the United States, shall be recorded in said entry book in the smallest subdivision entered on the books in the land office; and the county clerk shall, on or before the 25th day of February, of each year, procure a list of the lands situated in the county, which may have been sold during the previous year, and enter on the entry book opposite the description of the land, the name of the person entering the same and the date of the entry.

§ 21. It shall be the duty of the county clerk of each county to keep a book upon which shall be entered all transfers of real estate situated in said county, which entry shall contain a description of the tract of land sold, names of the parties, date of deed, and date of transfer.

§ 22. No deed of conveyance shall hereafter be recorded by the county register, until said deed shall be presented to the county clerk, and the tract or tracts of land therein mentioned, by him entered on the transfer book, as specified in the preceding section, and such clerk shall enter on the back of the deed of conveyance the date of the transfer, and said county clerk shall be entitled to receive from the person having such transfer made the sum of ten cents, for each tract of land conveyed in said deed.

§ 23. If the county register shall record any conveyance before the endorsement of the clerk thereon that the transfer has been made, he shall be liable to pay to the county clerk the sum of ten dollars by civil action.

§ 24. The said commissioners shall have power to submit to the people of the county, or at any regular or special election, the question whether the county will borrow money to aid in

the construction of public buildings; the question whether the county will aid, or construct any road or bridge, or to submit to the people of the county any question involving an extraordinary outlay of money by the county; and said commissioners may aid any enterprise designed for the benefit of the county as aforesaid, whenever a majority of the people thereof shall be in favor of the proposition as provided in this section.

§ 25. When county warrants are at a depreciated value, the said commissioners may, in like manner, submit the question whether a tax of a higher rate than that provided by law, shall be levied, and in all cases when an additional tax is laid in pursuance of a vote of the people of the county, for the special purpose of repaying borrowed money, or of constructing or ordaining to construct any road or bridge, or for aiding in any enterprise contemplated in the 24th section of this act, such special tax shall be paid in money and in no other manner.

§ 26. The mode of submitting the questions to the people, contemplated by the last two sections, shall be the following: The whole question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect or having operation, if it be of a nature to be set forth, and the penalty of its violation, if there be one, is to be published at least for four weeks in some newspaper published in the county. If there be no such newspaper the publication is to be made by being posted up in at least one of the most public places in each election precinct in the county, and in all cases the notices shall name the time when such question shall be voted upon, and the form in which the question shall be taken, and a copy of the question submitted shall be posted up at each place of voting during the day of election.

§ 27. When the question submitted involves the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to lay a tax for the payment thereof, in addition to the usual taxes under section sixteen, of this act; and no vote adopting the question proposed shall be

void, unless it likewise adopt the amount of tax to be levied to meet the liability incurred.

§ 28. The rate of tax levied in pursuance of the last four sections of this act, shall, in no case, exceed more than three mills on the dollar, of the county valuation in one year. When the object is to borrow money to aid in the erection of public buildings, as provided, the rate shall be such as to pay the debt in ten years. When the object is to construct, or aid in constructing any road or bridge, the annual rate shall not exceed one mill on a dollar of the valuation; and any special tax or taxes levied in pursuance of this act, becoming delinquent, shall draw the same rate of interest as ordinary taxes levied in pursuance of the revenue law of this territory.

§ 29. The said commissioners being satisfied that the above requirements have been substantially complied with, and that a majority of the votes cast are in favor of the proposition submitted, shall cause the same to be entered at large upon the book containing the record of their proceedings; and they shall then have power to levy and collect the special tax in the same manner that the other county taxes are collected. Propositions thus acted upon cannot be be rescinded by the board of county commissioners.

§ 30. Money raised by the county commissioners in pursuance of the last six sections of this act, is specially appropriated and constituted a fund distinct from all others in the hands of the county treasurer, until the obligation assumed is discharged.

§ 31. The said commissioners shall hold their sessions with open doors, and transact all business in the most public manner, and where the county has no court house, or the court house shall be unfit or inconvenient, they may hold their sessions for the transaction of business at any other suitable place at the county seat. All matters pertaining to the interest of the county shall be heard by the board of commissioners in session only, but they may continue any business from any regular session to an intermediate day.

§ 32. The books required to be kept by this act shall constitute the record of the board of county commissioners.

§ 33. Said commissioners shall have authority and power to provide for the erection and repairing of court houses, jails and other necessary buildings within and for the use of the county; and to carry out the provisions of this section they shall have power to make contracts on behalf of the county for the building or repairing of the same. They shall determine the amount of taxes to be levied for county purposes according to the provisions of this act, and the revenue law of this territory.

§ 34. The counties in this territory may sue and be sued, plead and be impleaded in any court in this territory, and in all cases where lands have been granted to any county for public purposes, and any part thereof has been sold and the purchase money, or any part thereof shall be due and unpaid, all proceedings necessary to be had to recover possession of such lands, or to enforce the payment of the purchase money, shall be instituted in the name of the proper county.

§ 35. Said commissioners shall have power to employ an attorney by the year, who shall be known as county attorney. But said commissioners shall in no case pay said attorney more than one hundred dollars per annum.

§ 36. When any judgment is obtained against the county, it shall be a lien upon the property of the county, and the public property shall be liable therefor, but no execution shall issue thereon, until the board of county commissioners shall have had six months' time to assess and collect a sufficient amount of revenue under the provisions of this act, to pay off and discharge said judgment or judgments, in addition to the ordinary expenses of the county.

§ 37. From all decisions of the board of commissioners upon matters properly cognizable before them, there shall be allowed an appeal to the district court by any person aggrieved, upon filing a bond with sufficient penalty, with one or more sureties, to be approved by the county clerk, conditioned that the appellant will prosecute his or her appeal without delay and pay all

...may be compelled by mandamus or otherwise to levy the tax herein provided to pay the same.

§ 7. Any precinct in any organized county of this state shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by provisions of this act; and in such case the precinct election shall be governed in the same manner as is provided in this act, so far as the same is applicable, and the county commissioners shall issue special bonds for such precinct, and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bond shall be the same as other bonds, and shall contain a statement showing the special interest of such bonds.

§ 8. All bonds heretofore voted and issued by any county or city in this state to aid in the construction of any railroad or other work of internal improvement, are hereby declared to be legal and valid, and a lien upon all the taxable property in such county or city, notwithstanding any defect or irregularity in the submission of the question to a vote of the people, or in taking the vote, or the execution of such bonds, and notwithstanding the same may not have been voted upon, executed or issued in conformity with law, and such bonds shall have the same legal validity and binding force as if they had been legally authorized, voted upon and executed. Provided that nothing in this section shall be so construed as to legalize or in any way sanction any vote of the people of Nemaha county heretofore had, for the purpose of aiding in the construction of any railroad, nor anything done by the county commissioners of said county, relative to said vote, or anything done by them in consequence of such vote.

§ 9. All acts or parts of acts inconsistent with this act are hereby repealed.

§ 10. This act shall take effect and be in force from and after its passage.

Approved February 15th, 1868.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE COUNTY OF OTOE,

Plaintiff in error.

vs.

JOHN T. BALDWIN,

Defendant in error.

BRIEF OF PLAINTIFF IN ERROR.

O. P. MASON & I. N. SHAMBAUGH, AND
WATSON & WODEHOUSE,
Attorneys for Plaintiff in error.

NEBRASKA CITY:
NEBRASKA CITY NEWS PRINT.
1883.

city may be compelled by mandamus or otherwise to levy the tax herein provided to pay the same.

§ 7. Any precinct in any organized county of this state shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by provisions of this act; and in such case the precinct election shall be governed in the same manner as is provided in this act, so far as the same is applicable, and the county commissioners shall issue special bonds for such precinct, and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bond shall be the same as other bonds, and shall contain a statement showing the special nature of such bonds.

§ 8. All bonds heretofore voted and issued by any county or city in this state to aid in the construction of any railroad or other work of internal improvement, are hereby declared to be legal and valid, and a lien upon all the taxable property in such county or city, notwithstanding any defect or irregularity in the submission of the question to a vote of the people, or in taking the vote, or the execution of such bonds, and notwithstanding the same may not have been voted upon, executed or issued in conformity with law, and such bonds shall have the same legal validity and binding force as if they had been legally authorized, voted upon and executed. Provided that nothing in this section shall be so construed as to legalize or in any way sanction any vote of the people of Nemaha county heretofore had, for the purpose of aiding in the construction of any railroad, nor anything done by the county commissioners of said county authorizing said vote, or anything done by them in consequence of such vote.

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Approved February 15th, 1869.

SUPREME COURT U. S.
FILED
DEC 28 1883
JAMES H. McKENNEY,
CLERK.

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Defendant in error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

On the 6th day of January, 1860, the Territorial legislature of Nebraska passed an act authorizing the board of county commissioners of Otoe county to submit to the people of that county the question whether county should *subscribe for stock*

in an amount not exceeding $75,000 in any railroad company then or thereafter located in Fremont county in the State of Iowa.

This act is as follows:

"Sec. 1. Be it enacted by the Council and House of Representatives of the Territory of Nebraska, That the board of county commissioners for Otoe County may at any time, by an order of said board, cause an election to be held for the purpose of ascertaining the will of the people of Otoe county, as to the propriety of said county subscribing stock for any amount not exceeding seventy-five thousand dollars to any railroad company, for the purpose of constructing any railroad now or hereafter to be located in Fremont county and State of Iowa.

"Sec. 2. If a majority of the legal voters of said county shall vote in favor of such proposition, then the board of county commissioners of Otoe county shall issue the bonds of said county for whatever amount of stock it may have been decided upon by such vote, to any railroad company, which bonds shall not bear any greater interest than ten per cent per annum.

"Sec. 3. This act shall take effect and be in force from and after its passage."

Laws of Sixth Session (N. T.) 112.

On the 11th day of January, 1861, an act was passed by the legislature authorizing county commissioners to submit to the people of their respective counties the question whether the county will aid or construct public buildings, the question whether the county will aid or construct any road or bridge, or submit to the people of the county any question involving any extraordinary outlay of money by the county. This act is found in the Laws of the Seventh Session of the Legislature of N. T., at page 146, and contains these sections:

"Sec. 26. The mode of submitting the questions to the people, contemplated by the last two sections, shall be the following: The whole question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect or having operation, if it be of a nature to be set forth, and the penalty of its violation if there be one, is to be published at least four weeks in some newspaper published in the county. If there be no newspaper, the publication is to be made by being posted up in at least one of the most public places in each election precinct in the county, and in all cases the notes shall name the time when such question shall be voted upon, and the form in which the question shall be taken, and a copy of the question submitted shall be posted up at each place of voting during the day of election.

"Sec. 27. When the question submitted involves the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to lay a tax for the payment thereof, in addition to the usual taxes under section sixteen of this act; and no vote adopting the question proposed shall be valid, unless it likewise adopt the amount of tax to be levied to meet the liability incurred."

Afterwards, on the 17th day of March, 1866, a special election was held in the county of Otoe for the purpose of determing whether Otoe county should issue its bonds to the amount of $200,000 for the purpose of securing an eastern railroad connection for Nebraska City. Before this election there was no advertisement of the question to be voted upon published in any newspaper, though there were at least two papers printed and published in said county. And the testimony produced by the defendant in this action shows that there is no record showing that the provisions of section 26 of the act of 1861 were complied with. And further, the testimony shows that there was no provision to lay a tax accompanying said proposition, as required by section 27 of said act.—And that the matter of laying a tax was not submitted to the people at said election, nor was it voted at said election to lay said tax.

Afterwards, at a meeting of the board of county commissioners of said county, in November, 1866, it was ordered that

$40,000 of the bonds voted at this election should be *donated* to the C. B. & St. Joseph R. R. Co., provided they would locate their road within one and a half miles of the ferry landing at Nebraska City.

In pursuance of this order $40,000 of the bonds of Otoe county were *donated* to the C. B. & St. Joe R. R. Co., and said bonds are of the following form:

"UNITED STATES OF AMERICA.

"No—— Otoe County Railroad Bond of 1887. $500.00.

"County of Otoe, Territory of Nebraska.

"Know all Men by these Presents: That the County of Otoe in the Territory of Nebraska acknowledges itself indebted and bound to the Council Bluffs and St. Joseph Railroad Company in the sum of Five Hundred Dollars, lawful money of the United States of America, to be paid to said Council Bluffs and St. Joseph Railroad Company or their assigns, at the office of the county treasurer of said county, on the first day of January in the year one thousand eight hundred and eighty-seven, with interest thereon from the first day of January next after the date hereof, at the rate of ten per cent per annum, payable semi-annually at the office of the county treasurer of said county, on the first days of July and January in each year, on the presentation and surrender, as they fall due, of the annexed coupons or interest warrants, the first payment

of interest to be made on the first day of July next ensuing the date of these presents.

"This bond is one of a series of one hundred and sixty, of the like tenor and date, one hundred of which are each for one hundred dollars, and sixty of which are each for five hundred dollars, in the aggregate amounting to the sum of forty thousand dollars, executed and issued, or to be issued from time to time as the wants of said county shall require, to pay to the Council Bluffs & St. Joseph Railroad Company as an appropriation made by said county to said railroad company to aid in the construction of the railroad of said company, to be located in Fremont county, through a point most convenient to Nebraska City.

"This debt is authorized by a vote of the legal voters of said county of Otoe, taken at an election duly held under and by virtue of an order of the county commissioners of said county, on the 17th day of March, 1866, in pursuance with the several acts of the legislature of the Territory of Nebraska in such cases made and provided, and a resolution of the board of county commissioners of said county granting such aid.

"In witness whereof, the said county of Otoe has caused this bond to be signed in its behalf by the chairman of the board of county commissioners and the treasurer, attested by the county clerk, and the seal of county affixed at the office of

the county clerk, in Nebraska City, Nebraska Territory, the twelfth day of November in the year of our Lord one thousand eight hundred and sixty-six.

"Register No.——

D. M. MARTIN,
Chairman Board Co. Com'rs.
MILLS S. REEVES,
Treasurer.

"Attest:
"ELISHA BENNETT,
County Clerk.
[Seal.]

"[Endorsed.]

"For value received, the Council Bluffs and St. Joseph Railroad Company does hereby assign, set over, and transfer to..... or bearer the within bond issued to the railroad company by the county of Otoe, in the State of Nebraska, and does hereby give and convey to said ..... full power to receive all money due thereon.

"In witness whereof, the president of said Council Bluffs and St. Joseph railroad company has hereunto set his official signature and affixed the seal of said railroad company, on the 18th day of November, 1869.

"Council Bluffs & St. Joseph Railroad,
By W. PHELPS, President."

Following further the history of these bonds, we next find under an act passed by the legislature of the State of Nebraska, February 16th, 1869, being "An act to enable counties, cities, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in this state, and to legalize bonds already issued for such purpose," an attempt made to legalize bonds heretofore issued in the following manner:

"Sec. 8. All bonds heretofore voted and issued by any county or city in this state to aid in the construction of any railroad or other work of internal improvement, are hereby declared to be legal and valid, and a lien upon all the taxable property in such county or city, notwithstanding any defect or any irregularity in the submission of the question to a vote of the people, or in taking the vote, or in the execution of such bonds, and notwithstanding the same may not have been voted upon, executed or issued in conformity with law, and such bonds shall have the same validity and binding force as if they had been legally authorized, voted upon, and executed." (See Laws of 1869, p. 92.)

We next find these bonds referred to in an act passed by the legislature of the State of Nebraska, at the same session, entitled "An act to authorize the county commissioners of Otoe county to issue the bonds of said county to the amount of one hundred and fifty thousand dollars to the Burlington and Mis-

souri River Railroad, or any other railroad running east from Nebraska City." And which act is as follows:

"Whereas, the qualified electors of the county of Otoe and State of Nebraska have heretofore, at an election held for that purpose, authorized the county commissioners of said county to issue the bonds of said county in payment of stock to any railroad in Fremont county, Iowa, that would secure to Nebraska City an eastern railroad connection, to the amount of two hundred thousand dollars; and whereas, but forty thousand dollars have been issued,

"Section 1. Therefore be it enacted by the Legislature of the State of Nebraska, That said commissioners be and they hereby are authorized to issue one hundred and fifty thousand dollars of the bonds aforesaid to the Burlington and Missouri River Railroad Company, or other railroad company that will secure to Nebraska City a direct eastern railroad connection, as a donation to said railroad company, on such terms and conditions as may be imposed by said county commissioners.

"Sec. 2. Said bonds, when so issued are hereby declared to be binding obligations on said county, and to be governed by the terms and conditions of an act entitled "An act to enable counties, cities, and precincts to borrow money or to issue bonds to aid in the construction or completion of works of in-

ternal improvement in this state, and to legalize bonds already issued for such purpose, approved February, A. D. 1869."

"Sec. 3. This act to take effect and be in force from and after its passage." (See Laws of 1869, p. 260.)

We next hear of these bonds in 1873. One Meadville brought a suit in the district court of Otoe county, and obtained a perpetual injunction restraining M. M. Hamlin, the treasurer of said county, from collecting a tax levied on his property for the payment of these bonds. The case went to the supreme court of the State of Nebraska, and the court in a well considered opinion reviews the whole history of these bonds, and sustained the judgment of the lower court, and held these bonds void.

Hamlin v. Meadville, 6 Neb. 227.

In obedience to this decision of the supreme court, the commissioners have not levied any tax to pay these bonds, nor have the treasurers of said county ever attempted to collect any tax that was levied prior to said decree.

The defendant in error in the circuit court of the United States for the district of Nebraska, brought these suits to collect the past due interest coupons of the aforesaid bonds, and afterwards a decision was rendered thereon as follows: *First*: By both the Circuit and District Judges it was held that the

statute of limitation had run against $10,000 of these coupons, and *second*, a certificate of decision was filed as to the legality of the balance of said coupons, the Circuit Judge holding that the bonds were valid and the District Judge that they were not valid. The Plaintiff in error now brings this case to this court:

1st. On the certificate of division of the judges.

2d. On writ of error.

ARGUMENT.

I.

Defendant to 440 causes of action in Case No. 235 G., pleads the Statute of Limitations of Nebraska.

Sec. 5 of the Code of Civil Procedure of Nebraska provides that "Civil actions can only be commenced within the time prescribed in this title, after the cause of action shall have accrued." Compiled Statutes of Nebraska, p. 531.

And Sec. 10. "Within five years, an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment."

This action was commenced on April 1st, 1882, and all the coupons that became due on and before January 1st, 1877, are barred by the Statute of Limitations.

The cause of action upon a coupon of municipal bond, whether detached or not, held to accrue, and limitation to commence from its maturity.

Town of Koskonong v. Burton, —Otto —; decided March 6, 1882.
4 Morr. Trans., 152.

II.

The first question we raise in regard to validity of these bonds is whether the territorial legislature had the power or authority under the organic act to authorize a county to issue its bonds for the purpose set forth in the act of January 6th, 1860.

The organic act provides in Sec. 6, "That the legislatve power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisons of this act."

Under this provision, could the legislature by a special act confer on the county of Otoe the special corporate authority and power to issue bonds.

At common law counties had no authority to issue bonds. And we contend that the territorial legislature could only confer the power to its commercial paper by a general statute.

In 1867 the first constitution of the State of Nebraska was adopted, and among other constitutional provisions it contains the following under the article entitled "Corporations:" "Sec. 1. The legislature shall pass no special act conferring corporate powers."

This constitutional provision has been before the supreme court of this state in various cases, and has been construed by said court in special reference to the question now before us: Could the legislature by a special act confer on a county the authority to issue bonds, or by such an act legalize bonds issued in direct contravention of said provision."

Clegg v. School District, 8 Neb., 178.
Dundy v. Richardson County, 8 Id., 508.

This question was not raised in the case of Hamlin v. Meadville, 6 Neb., 227, nor was this question presented to the supreme court of the United States in the case of the C. B. & Q. R. R. Co. v. Otoe County, 116 Wall, 667, where the question of the validity of the bonds issued to the C. B. & Q. R. R. Co. under the special act of February, 1869, was raised, and by virtue of which act plaintiff in his petition would have the court believe that the legislature of Nebraska recognized the validity of these bonds. That the legislature, by a sweeping "whereas" tacked on to an act unconstitutional on its face,

could legalize these bonds that were not only void for want of each and every power that was necessary to make them valid, but are also void because issued in direct violation of the very act under which they were pretended to be issued, and which on that account alone would be void, even had the act itself been legal.

These bonds, we submit, are void for "want of power by the county commissioners to issue them."

1. The authority, if any, given to the commissioners by this act, and by the vote of the people, was to *subscribe* for stock in a railroad company. Under such authority, can they make a *donation* of the bonds of the county to a railroad company?

The supreme court of the United States, in passing upon the case of the C. B. & Q. bonds above, held that there was no solid distinction between a subscription to stock and a donation. In that case the point here raised did not come before the same manner that it does in this case. It is true that the vote of the people was to subscribe for the stock, but the supreme court in the case held that under the act of February, 1869, there was no necessity for a vote of the people upon a question of issuing bonds, if the legislature saw fit to prescribe another mode by which the aid should be extended, and inasmuch as the act of February, 1869, prescribed that the bonds to the amount of $150,000 should be issued to the company *as a*

donation, we fail to see why the court should consider it necessary to attempt to make the distinction it did between *a subscription* and *a donation* to a railroad company.

But in the case at bar, the pretended act of January 6th, 1860, prescribed "that the board of county commissioners for Otoe county may at any time, by an order of said board, cause an election to be held for the purpose of ascertaining the will of the people of said county, as to the propriety of said county *subscribing stock*, &c." This was the question that the people voted on, and by their vote, if it conferred any power on the commissioners at all, they authorized the county to *subscribe for the stock of said road*, and the commissioners had no power to frustrate the will of the people by making a *pure gift* and *donation* to the road. Whatever power the commissioners had in the premises was conferred on them by this vote. The legislature had prescribed this means of exercising their power; without a vote they could not issue a bond under this act. And after a vote was taken, they had no power *to give away for nothing* the bonds that the people had voted to give the road as a *subscription to their stock*. The supreme court of the United States in the case above named, seems to set a very light value on the stock of a railroad. True, railroads will "water" their stock and increase it to such an extent that it often becomes of small pecuniary value; but still we insist that while a road is in operation at all, the stock of the road, if it

has no market value, may in many cases be used to advantage by the stockholder. As Maxwell, J., in the Hamlin v. Meadville case says:

"There is no presumption that the stock of a railroad company is of no value; but even if not very valuable, the stockholder to the exten tof his stock has a voice in the election of officers of the company and in the control of its affairs, that may be of more value to his locality than the mere market value of his stock."

And the court in that case decided that "if the authority to issue the bonds (referring to these same bonds now in controversy) had existed, the commissioners had no authority under the vote of the people of the county to make a *donation* thereof to the railroad company.

Hamlin v. Meadville, 6 Neb., 235.

The supreme court of the United States in construing a *proviso* in the constitution of Illinois, saving to municipalities the right to make *subscriptions* which have been authorized under existing laws, held that this *proviso* did not extend to *donations* authorized under existing laws, and in this decision virtually overruled their former decision in the C. B. & Q. case, in 16 Wall., 667, where they said there was no solid distinction between *a subscription* and *a donation*.

Town of Concord v. Portsmouth Savings Bank, 92 U. S. 625.

2. The act of January 6th, 1860, authorized a subscription "for any amount *not exceeding seventy-five thousand dollars* to any railroad company" to be submitted to the people of Otoe county. The commissioners submitted a proposition to vote *$200,000*. This was an irregularity that subsequent legislation could not cure. It was a direct violation of the express authority given to the commissioners by this act, and the bonds issued in excess of the limit fixed by statute, are no more the bonds of the county than if they were mere forgeries.

Hamlin v. Meadville, 6 Neb., 235.

3. The general law passed January 11th, 1861, required that when the question to be submitted involved the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to lay a tax for the payment thereof, in addition to the usual taxes under section sixteen of this act; and no vote adopting the question proposed shall be valid, unless it likewise adopt the amount of tax to be levied to meet the liability.

Laws of 1860—1, p. 150, sec. 27.

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Laws of 1860—1, p. 150, sec. 27.

Veeder v. Lima, 19 Wis., 280.
Bishop v. Milwaukee, 21 Wis., 257.
Davies Co. v. Howard, 13 Bush. (Ky.) 101.

The principal in all of these cases being that it is the imperative command of the statute that stamps its impress of invalidity on the bonds.

III.

The court erred in holding that the defendant in error was a bona fide purchase of these bonds. The answers of the plaintiff in error in both cases set forth that defendant in error is not a *bona fide* purchaser, for value, of said bonds and coupons, and this being a direct issue made in the pleadings, and it was incumbent on the defendant in error to show his *bona fides*. This he failed to do.

The testimony of defendant in error, taken on the 5th day of April, 1883, pretends to show that he was an innocent purchaser of bonds and coupons in controversy, and purchaser for value of the same. In examining the testimony offered by Baldwin, we fail to see that he has, by his testimony, shown that he was either an innocent purchaser, or a purchaser for value. The testimony shows that he bought the bonds at 50 cents on the dollar, that he bought them from one Robert Percival, who was holding them as attorney for the owner, or pretended owner, Mrs. Phelps, for collection.

On cross examination, the defendant in error testified that he did not make any inquiries as to why they were offering the bonds at 50 cents on the dollar, but he testifies that he understood they were discredited; that at the time he bought the bonds, there was a large amount of coupons, attached to the bonds, past due.

It further appears, from the testimony, that he consulted attorneys about the bonds, and as to the question whether they were good or not, and that he made up his mind they were good, from similar cases that they had had in Iowa. He further testifies that he never presented the bonds or coupons to Otoe county, for payment, and that he bought them in 1880, with all the past due coupons attached; that Percival told him that he considered the bonds perfectly good, and that no doubt Baldwin could make his money out of them.

On this testimony, we contend that the defendant in error was neither an innocent purchaser, nor purchaser for value of bonds, in such a sense as would permit him to set up this fact as against the irregularities, or want of power in issuing the the bonds.

We contend that the failure of the commissioners of Otoe county, to give four weeks notice, before holding the election on these bonds, was, an absolute want of power, and not mere

irregularity, that if this defect in notice, is want of power the bonds are void even in the hands of a *bona fide* purchaser, or of a purchaser for value; and that even though the defendant in error was a purchaser for value, it does not help him, against this want of power.

Again, we show that according to the testimony, Mr. Baldwin does not stand before the court as an innocent purcaser of these bonds; that he purchased them on according to his own testimony, at the rate of of 50 cents on the dollar; that he knew the bonds were discredited; that he talked with his lawyers, and consulted, before purchasing, about the question whether he could make the bonds by lawsuit; that he never presented the bonds to the County of Otoe for payment, and that there were ten or fifteen years past due coupons, on these bonds when he bought them. All these facts are sufficient to show that Mr Baldwin bought these bonds with his eyes open; that he knew all about the bonds; that he knew the history of the bonds; and ought clearly to show that he does not stand before he court as an innocent purchaser, or a bona fide holder, or purchaser for value, of the bonds in question. So that, if the failure of notice of election on these bonds, that we have raised as defense against these bonds, is a mere irregularity and not want of power, still, the defendant in error is not such a *bona fide* purchaser of these bonds, as to entitle him to recover, provided it is a mere irregularity, which we do not admit for a moment, and not want of power, in the issue of the bonds.

IV.

Next we deny that the legislature could, under these acts, authorize a county to vote aid to a road *outside* the state. The case of Railroad v. Otoe County, 16 Wall., 667, which was carefully quoted by counsel at every turn of this case, does not help the defendant in error in any one particular for which it is cited, as will appear on referring to the opinion therein. This case was decided on two points: *First*, that the legislature of Nebraska, under its constitution, could, by the special act of 1869, authorize the issue of the bonds to the C. B. & Q.—referring to the act of February15, 1869, and, *second*, that it was not necessary for a vote of the people to be taken in such case, as the legislature had the right to dispense with this matter, if it so thought fit, in giving the authority to issue these bonds. *No other point* was decided in this case and in every other case where bonds issued to a road *outside* the state have been sustained, the bonds were issued under a *special act*.

Again, if these bonds were issued under the act of January, 1860, they were void for defects and irregularities which no subsequent legislation could cure, and which defects would still avoid them in the hands of a bona fide purchaser.

Sec. 26 of the act of January, 1861, provides that "the mode of submitting the questions to the people contemplated by the last two sections *shall* be the following: The whol-

question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect or having operation, if it be of a nature to be set forth, and the penalty of its violation, if there be one, *is to be published at least four weeks in some newspaper published in said county.* If there be no newspaper, the publication is to be made by being posted up in at least one of the most public places in each election precinct in the county," etc.

This section is mandatory, and provides that at least *four weeks'* notice must be given in either of the manners therein prescribed. Now, let us see what the record shows in this respect.

The record of the county of Otoe offered in evidence by plaintiff in error, though meagre in some respects, on its face shows in the most glaring manner that this provision was neither complied with nor attempted to be complied with.

The county clerk, it appears, issued the following call:

"In pursuance of the authority in me vested by law, I hereby call a meeting of the commissioners of Otoe county, to be held at their usual place of meeting in Nebraska City, of said county, *on Saturday, the 24th day of February, A. D. 1866,* to take into consideration the question of submitting to the people of said county the issue of the bonds of said county, not exceeding $200,000 in amount, to be used in procuring to said

county an eastern railroad connection.

"ELISHA BENNETT,

"*County Clerk.*"

In pursuance of this notice the commissioners met *on February 24th, 1866*, and ordered an election to be held *on the 17th day of March, 1866*, or exactly *three weeks* after said order was made.

This, we contend, was a defect (and it makes no difference under which act counsel claims these bonds were issued, for it affects both acts); *it was one of jurisdiction;* that it was one that the commissioners could not be satisfied with to the contrary; that it appears on the face of the proceedings; it vitiates the pretended election, held, it appears, without notice; and that it could not be cured by any subsequent recitals made by the commissioners. And though the record may have been made by these men who were at that time engaged in issuing these bonds in a very artificial manner, still this fact crops out, and no omission or meagreness of the record on other matters can conceal it.

And further, the face of the bonds recite that "this debt is authorized by a vote of the legal voters of said county of Otoe, *taken at an election duly held under and by virtue of an order*

show this. And defendant in error has produced no proof to show his bona fides, or to show that he ever gave any value for these bonds.

But for the moment admitting that he were a bona fide holder, then as counsel admits, he is affected with notice of what appears on the face of the bonds. Therefore he is charged with notice that the election took place on the 17th day of March, 1866, and that it was held under and by virtue of an order of the county commissioners of said county, on the 24th day of February, 1866, or just *three weeks* before said election. He is further charged with the fact that the law required *at least four weeks'* notice of said election.

And we contend that this defect is such a *want of power* that avoids these bonds in the hands of a bona fide purchaser, and which could not be cured by subsequent legislation.

In Wisconsin a town was authorized to subscribe for stock and issue its bonds in payment, upon an election upon due notice. The bonds recited that they were issued by the supervisors in pursuance of an act of the legislature and a vote of the electors of the town. *No notice was actually given.* The bonds were declared void. This defect was considered not a mere irregularity but a *want of power.*

Veeder v. Lima, 19 Wis., 280, followed in
Bishop v. Milwaukee, 21 Wis., 257.

And further, we contend that under the several acts of the legislature of the Territory of Nebraska, there was but one way in which the county could obtain the power to issue these bonds. That power could only be conferred by a vote of the people at an election held after at least four weeks' notice. And that without a notice there could be no election, aad without an election there could be no power.

The rule stated by Mr. Justice Swayne, in Gelpcke v. The City of Dubuque, 1 Wall, No. 210, is in our favor, for the county in this case had no power, nor had it *under any circumstances* power to issue these bonds *without notice of four weeks* between the order for the election and the election.

The position of a *bona fide* holder of municipal bonds, void for want of power in the authorities to issue the same, is well defined by Chief Justice Waite, in the case of Anthony v. Jasper County, 101 U. S., 697: "Dealers in municipal bonds are charged with notice of the laws of the state granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality, the *bona fide* holder is protected against mere irregularities in the manner of execution, but if there be a want of power, no legal liability can be created. Also see Kankakee County v. Etna L. Ins. Co. U. S. S. C., Feb. 5, 1883; reported in 2 S. Rep. 80 and 16, C. L. J., 236.

VI.

These bonds being void for want of power, and not only for mere irregularity in the mode of issuing them, could the legislature of Nebraska by section 8 of the act of February 15th, 1869, above set forth, legalize the same? Even if there are no constitutional objections to this act, are the defects in the issuing of these bonds above set forth of such a nature that they can be cured by subsequent legislation? We think not.

Burroughs on Public Securities, sec. 33, reviews this matter thoroughly, and the weight of authorities cited there held that if the defect arises from a failure to observe some constitutional provision on the subject of municipal aid, or if it consist in the non-performance of some act which the legislature could not dispense with in the enabling act, which was essential to the exercise of the power, the bonds are void, and no curing act give them vitality. They are void and no legislative act can vitalize them.

From the organic act the legislature derived no power to pass the act of 1860. The legislature had no original power in the matter at all, it could have no power to legalize these bonds.

This was the ruling of the supreme court of Nebraska on the validity of these bonds, in Hamlin v. Meadville, *supra*, and

the court held these bonds void, and held that the legislature had no power to legalize them.

Again, the act of February 15th, 1869, entitled "An act to enable to the counties, cities and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvements in this state, and to legalize bonds already issued for such purpose," does not legalize these bonds for the following reasons:

1. This act is unconstitutional. The constitution of 1867, section 19 of article II, provides that no bill shall contain more than *one subject*, which should be clearly expressed in the title. The only purpose of this act, as expressed in the title, was to authorize the issue of the bonds. Under such a title the legislature could not (even if it had the power to do so,) constitutionally legalize these bonds.

Hamlin v. Meadville, 6 Neb., 227.
White v. City of Lincoln, 5 Id., 505.
City of Tecumseh v. Phillips, 5 Id., 305.
Lincoln building, &c., v. Graham, 7 Id., 179.
Miller v. Hurford, 11 Id., 381.
State v. Young, 47 Ind., 150.
Walker v. The State, 49 Ala., 329.
Slawsen v. Racine, 13 Wis., 398.
Quinlan v. Rogers, 12 Mich., 168.

2. The bonds in controversy were issued under a special act for the purpose of constructing a railroad in *Fremont county, in the state of Iowa.* The law seems to be settled that a municipality can legally issue its bonds to a railroad partly or wholly in another state. It is admitted that the Council Bluffs & St. Joseph Railroad was built *wholly outside the state of Nebraska.* The act of 1869 does not attempt to legalize these bonds. The title says it is to "enable counties, cities, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement *in this state*, and to legalize bonds already issued for such purpose." Clearly this act only attempted and was only aimed to legalize bonds issued to borrow money or to aid in the construction and completion of works of internal improvement *in this state.* It wouldtake the wildest stretch of the imagination to construe this to legalize bonds issued under a special act to a *foreign corporation* for the purpose of building a railroad in a *foreign state.* And the subsequent action of the legislature on the same day, February 15th, 1860, in including in the act authorizing the issue of $150,000 to the Burlington & Missouri Railroad Co., this provision: "Sec. 2. Said bonds when so issued are hereby declared to be binding obligations, on said county, and to be governed by the terms of an act entitled 'An act to enable counties, cities and precincts to borrow money or to issue their bonds to aid in the construction or completion of works of internal improvement in this state, and to legalize bonds already issued for such purpose, approved

February, A. D. 1869," clearly shows what bonds the legislature meant to legalize, to-wit: Those issued to aid works of internal improvement *in this state*.

VII.

The question as to the validity of the bonds in controversy has been passed upon and settled by the supreme court of Nebraska, in the case of Hamlin v. Meadville, aboved cited. In that case the court held *that these bonds were absolutely void for want of power in the commissioners of Otoe county to issue them, and that these bonds were not legalized by the subsequent act of February, 1869.* In this case *an injunction was granted* by the district court *forever restraining M. M. Hamlin, the treasurer of Otoe county, and his successors in office from collecting a tax levied to pay these bonds and coupons.* The supreme court *affirmed the decree* of the district court aforesaid, and this injunction is now in full force, unmodified and unreversed against the treasurer of Otoe county. If this court should render a judgment against the County of Otoe in this case, disregarding the aforesaid judgment and decree of the state court, how could such a judgment be collected? The individual property of the citizens of the county could not be taken in execution. The county has no property that could be levied on for such purpose. Suppose this court should award a writ of *mandamus* commanding the commissioners of said county to levy a special tax to pay the judgment, what would

be the result? Of course the commissioners would obey the writ and levy the tax, but that would not help matters; the injunction of the state court being in force, the treasurer could not collect the tax. He dare not disobey the injunction. If he did, he would be liable to fine and imprisonment. Or if this court were to go still further, and issue a writ of *mandamus* to the treasurer, commanding him to collect the tax, the treasurer would then be placed between two judicial fires, and whichever course he took he would run his head into the lion's jaws; he could not obey both courts, as he could not serve two masters.

The federal court has *no higher jurisidction* than the state court. *It cannot dissolve this injunction.* It could not *enjoin a judgment* of the state court, where it only has concurrent jurisdiction with it. How could it award a writ of *mandamus* in direct conflict with an injunction of the state court?

Again, it is not probable that the state court will dissolve this injunction. The law, in pursuance of which the injunction was granted, has been *finally settled* in the supreme court of the state in two cases (6 Neb., 227, and 2 Neb., 177), and it is not likely that these decisions will be overruled.

And further, it is the well settled rule of the federal courts that in a case like this, the federal court will follow the decision of the state court.

Burroughs on Public Securities, in an exhaustive chapter (chap. XI, sec. 46), reviews all the decisions on this matter, and all the authorities are cited there on the question, and the following are the results as laid down by him as to municipal bonds:

1. The general rule is undoubted that upon the construction, of a statute or state constitution the federal courts adopt and enforce the views of the state courts; they take the statute or constitution as construed by the state court.

2. When the federal courts construe a statute or constitution before a state court, they will not yield to a single decision contrary to their views, but they will yield if it becomes the settled course of decision in the state.

In the case at bar there is no conflict of decisions between the state and federal courts. The only decision construing the statutes involved in this action, and the issue of the bonds in controversy, is that of Hamlin v. Meadville, in 6 Neb., 227, and according to all precedents of the Federal courts, and in accordance with the judiciary act of 1789, organizing the courts of the United States, which provides that "The laws of the several states, except where the constitution, treaties or states of the United States otherwise provide, shall be regarded as rules of